



COMMENT CARD

There are three ways to submit comments on the Tongue River III Draft Supplemental Environmental Impact Statement.

1. Provide verbal comments at this public meeting (all verbal comments will be transcribed),
2. Submit written comments to the address shown below, or by placing this comment card in the comment box located at the sign-in area; or
3. Submit your comments electronically at the Surface Transportation Board's website, www.stb.dot.gov.

NAME: Doug Martens

ADDRESS: Box 1554

Forsyth MT 59327

TELEPHONE: 406-356-2636

DATE: 12-3-04

COMMENT:

I would like to ask several questions

1. why is this line needed 1

2. who will be operating the fire equipment mentioned in the document 2

3. who will be responsible for suppression costs & lost property for a railroad started fire 3



Please use the reverse side or attach any additional pages.

To submit comments by mail, send to:
 Surface Transportation Board
 Case Control Unit
 Washington, DC 20423
 Attn: Kenneth Blodgett, STB Docket No. FD 30186 (Sub-No. 3)

SEA's Responses to Comment Letter P34
Doug Martens (December 3, 2004)

P34.1 Please see Master Response 9, Determination of Public Convenience and Necessity.

P34.2 Both the railroad and the local county fire department would respond to any wildfires started by rail line operations. Experience suggests that railroads are not responsible for starting many fires. The MT DNRC lists the causes of fire statewide for the year 2004, as shown in the table below. Out of the 10,806 acres that burned last year, only eight separate fires were attributed to railroads, contributing a total of 1.8 acres lost (0.02 percent). The vast majority of acres burned resulted from fires started by lightning (67 percent) and debris burning (29 percent).

2004 Summary of Direct Protection and County Protection Fires & False Alarms		
Cause	# Fires	Total Acres
LIGHTNING	162	7,281.1
ARSON	4	0.4
CAMPFIRE	45	47.5
DEBRIS BURNING	59	3,131.6
EQUIPMENT	8	3.1
MISCELLANEOUS	36	338.0
POWERLINE	7	2.5
RAILROAD	8	1.8
SMOKING	3	.3
FALSE ALARMS	59	0
TOTAL	401	10,806.5
49% Lightning caused fires (excluding false alarms)		
51% Human caused fires (excluding false alarms)		

Source: <http://dnrc.mt.gov/forestry/fire/business/statistics.asp#firehistory>

P34.3 Costs of fire suppression would be borne both by the railroad and by the local county fire department.



Julia Page Box 608, Gardiner, MT 59030

December 6, 2004

Surface Transportation Board
Case Control Unit
Attn: Kenneth Blodgett
STB Docket No. FD 30186 (Sub-No. 3)
Washington, D.C. 20423

Dear STB:

I have been aware of the proposed Tongue River Railroad since about the mid 1980's. I celebrated when the permit for the Montco Mine was withdrawn. I laughed, but it wasn't funny, when the company decided they didn't like the approved 4-mile route through to Decker and decided, instead, it would pursue the Western Alignment. The speculators are attempting to inch their way toward their goal, by piece-mealing the analysis and with this DSEIS, the STB is going along with that strategy. It does not meet the test of NEPA.

1

The original EIS was written long ago. The original analysis was for an 89-mile dead end road to service the Montco Mine. The nature of the line was changed completely when it was proposed to run through to Decker. Wyoming coal will now be able to out-compete Montana coal in the traditional Montana markets in the upper mid-west. The original purpose, ostensibly serving Montana, is completely by-passed. The STB needs to step back and take a hard, comprehensive look at the impacts of this railroad on existing Montana coalmines and employment and on the existing agricultural community in the Tongue River valley.

2

The area of the railroad corridor is slated for extensive coal bed methane (CBM) development. In some cases the corridor and CBM development plans overlap. The DSEIS has not considered the impacts of these two heavy industrial uses in tandem. The Western Alignment requires much more cut and fill next to the river. What is the impact of that increased potential sediment load, especially in conjunction with the increase in high-sodium CBM produced water going into the river? What's the impact of these two industrial intrusions on the existing agricultural economy of the valley?

3

Why has the DSEIS not incorporated new data that is available on water quality in the Tongue? There has been a lot of work done in the last few years because of the focus on water quality brought about by the threat of CBM development. That information should be part of the current analysis.

4

The railroad will have authority to condemn property through eminent domain. The landowners who will be condemned face a devastating future. They have made improvements to their land and operations in the last 20 years that need to be evaluated when considering the impacts of this railroad. This DSEIS only looks at the Western Alignment as opposed to the 4-Mile alternative; it should look at the impact of the whole line, north to south, in terms of today. Have the effects of a railroad cutting through ranches been evaluated in terms of today's real estate market? Fires, weeds, split grazing land, and noise are just the worst of the impacts a landowner can expect with a railroad running through their place.

4

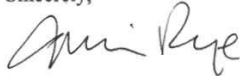
Is this railroad necessary to anyone but the speculators? If it is, then why hasn't any progress been made in the 8 years it has had a permit. The Montco Mine permit was finally pulled because no progress had been made toward developing the mine because it didn't make any economic sense to do so. Why hasn't the same thing happened to the permit for this railroad? The railroad is a bad idea. It will hurt Montana ranchers and farmers in the Tongue River Valley. It will hurt Montana coalmines and coal miners by taking their present coal markets.

5

This idea of writing a supplemental EIS of a document that was originally done over 15 years ago is invalid. At the very least the STB needs to write a new EIS that looks at the impacts today of the entire line using current information.

6

Sincerely,



Julia Page

SEA's Responses to Comment Letter P35
Julia Page (December 6, 2004)

P35.1 For a discussion of the scope of the SEIS, please see Master Response 8, Scope of the EIS is too narrow.

P35.2 The purpose of TRRC's entire rail line from Miles City to Decker is to provide for the transport of coal from existing and future mines to markets in the Midwestern and Northeastern states. This includes coal from mines in the Gillette, Wyoming area and coal from several existing and possible future mines in Montana. According to TRRC, the Clean Air Act of 1990 has created a strong market for low sulfur coal (i.e., compliance coal). The Powder River Basin of Wyoming and Montana contains the great majority of the U.S. reserves of such compliance coal.

Without rail service, potential mines in the Ashland area are unlikely to be developed. Due to these circumstances, completion of this project may trigger development of the Ashland area mines shown on Figure 2-1 of the Draft SEIS. As shown in Table 2-2, it is projected that 24.5 million tons of coal from Ashland area mines would be transported on the proposed rail line in the years between 2009 and 2019. As discussed in Section 2.2, this is expected to have several tax and employment benefits for the state of Montana. See Master Response 11, Loss of Competitive Advantage Held by Montana Coal, for more information concerning competition with Wyoming coal. Regarding agricultural impacts, the Draft SEIS recognizes the potential for adverse impacts on owners of agriculturally productive fields. Mitigation Measure 1 has been developed to address direct and indirect land losses resulting from the project.

P35.3 The effect of the project in conjunction with CBM wells and other development was presented in Chapter 6 of the Draft SEIS. For further discussion, please see Master Response 21, Adequacy of Cumulative Analysis. The effect of the project on erosion and sedimentation was presented in Section 4.3.3 and 4.3.4 of the Draft SEIS. For additional discussion, please see Master Response 12, Effects of the Project on Erosion and Sedimentation Rates.

P35.4 Master Response 20, Total Maximum Daily Load (TMDL), presents a complete discussion of the new standards being developed by the State of Montana. The effect of the proposed rail line on existing land owners is thoroughly discussed in the Draft SEIS. The Draft SEIS clearly states that direct and indirect loss of agricultural lands would be an unavoidable adverse effect of either the Western Alignment or Four Mile Creek Alternative. Mitigation Measures 1 through 5 would minimize the effect to ranching operations by requiring avoidance, replacement, or compensation for loss of land and capital improvements, and also require the installation of fencing, if desired, and cattle passes to maintain access across the rail line ROW. Recommended Mitigation Measures 9 through 13

address fire prevention and suppression and Mitigation Measure 21 addresses the control of noxious weeds.

- P35.5 The need for the proposed rail line is discussed in Chapter 2 of the Draft SEIS and will be considered by the Board as part of their deliberations. For further discussion, please see Master Response 9, Determination of Public Convenience and Necessity. For a discussion of the effect on Montana coal mines, please see Master Response 11, Loss of Competitive Advantage Held by Montana Coal.
- P35.6 The scope of the analysis is thoroughly discussed in Section 1.5 of the Draft SEIS. Master Response 16, The Need for a New EIS, presents additional information on why a new EIS was not prepared for this proceeding.

December 3, 2004



Mr. Kenneth Blodgett
 Surface Transportation Board
 Case Control Unit
 Washington, D.C. 20423

RE: Tongue River Railroad
 STB Finance Docket #301111186
 (Sub #3)

Dear Mr. Blodgett:

Recently I attended a hearing in Miles City, MT concerning an EIS regarding the above named project. Specifically, the hearing involved a proposed alternative to the southernmost segment of the TRR known as the Western alignment. However, comment from those speaking at the hearing had little or nothing to do with the Western Alignment. Rather, it was, once again, a opportunity for the naysayers to register their complaints about the railroad in general.

Please include me among supporters of the Tongue River Railroad project, and in support of the Western Alignment which appears to be less intrusive and more environmentally friendly than the Four Mile Creek route.

I am a CPA in Miles City and life long citizen of southeastern Montanan. My family heritage is agriculture, and I continually observe the economics of agriculture in my profession. After attending the hearing, I have the following comments.

1. I very much appreciate the Tongue River ranchers/farmers points of view. There is little argument that a railroad would be disruptive to their operations for a while at least, creating barriers and crossing issues. There will be added noise. They are resourceful and will adapt, as have many before them. Generous settlements for right of way may very well mitigate the objections. Such could provide sufficient resources to purchase life insurance to provide for absentee children, to retire debt, to make capital purchases not possible without bonus capital. Thousands of ranchers/farmers co-exist with railroads all across the country.
- 2.
2. A representative of area railroad employees voiced an objection that their jobs are in jeopardy. I submit that the only risk is a change in location. Among the features of free enterprise is the right to operate in the most efficient manner possible, such as a shorter route. It's no different than a Tongue River rancher choosing to

build a bridge across the river to shorten his distance to his fields or road to market.

3. Concerns were expressed that neither the railroad nor coal mining were economically viable because of insufficient demand. Private enterprise will make that determination, which has apparently already been concluded, or there would no longer be interest from a railroad or from mine developers. 4
4. Without question, development of the railroad, likely followed by coal mining and power plants, will enhance the tax bases of area governments. Not only will it generate greater tax revenue for these entities, but it will lessen the tax burden on Tongue River and all other property owners, as existing tax levies are spread in part to these new industries. 5
5. Miles City and other commerce centers are dependent on population for a sufficient customer base. Without such, fewer goods and services, including medical, are available to our ranch customers. Off farm employment, especially for farm spouses, would be less available. A healthy economy will promote increased shopping, recreation and entertainment opportunities. 6
6. Specific economic enhancements include more jobs during construction phases, railroad operation, mine operation, generation plant operation, attendant supply and administration activities. 7

In summary, the economic potential of this project, coupled with generous settlements to affected landowners outweighs the emotional fears and environmental arguments. For the reasons stated above, I strongly urge the STB to approve all facets of the TRR and to promptly move forward. Thank you.

Sincerely yours,


Douglas H. Bengé, CPA

99 B2/12m Dr.

Miles City, MT 59301

406-232-2343 (H)
406-234-4241 (W)

**SEA's Responses to Comment Letter P36
Douglas Benge (December 3, 2004)**

P36.1 Comment noted.

P36.2 Comment noted.

P36.3 Comment noted.

P36.4 Comment noted.

P36.5 Comment noted.

P36.6 Comment noted.

P36.7 Comment noted.

Marya Grathwohl
 HC 42, Box 515
 Busby, MT 59016

Surface Transportation Board
 Case Control Unit
 Washington, D.C. 20423
 December 3, 2004



Dear Board Members,

I am thoroughly appalled that once again the Tongue River Railroad is being proposed! I strongly oppose such a wrong minded plan. Do NOT follow through with approving this unnecessary and destructive railroad line.

1

Come live here and experience the life and beauty of the Tongue River Region. It will break your heart to see this railroad happen. We do NOT want our region to become an industrial zone. There has been NO serious study of the impact of the entire 130-mile long railroad on the Tongue River Valley and the people and animals that live here. This is a violation of the National Environmental Policy Act's mandate to examine the cumulative effect on a region of a proposed project. It is time to obey the law carefully. There must be a comprehensive EIS that takes into account the proposed coal bed methane wells, the proposed railroad, a 750 megawatt power plant and coal mine. Please do your work with integrity. Many lives here depend on that!

2

We are very concerned about the quality of our air, already compromised by nearby power plants and strip mining. Also, the railroad will negatively impact the fragile Tongue River and adjacent streams. The draft EIS was done without input from all landowners impacted by the route. What happened to respecting property rights as well as the land itself?

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Finally, the proposed railroad is yet another economic error. It will duplicate existing lines while providing no service to coal mines that need rail access. It will take away Colstrip coal's competitive advantage in Midwest markets.

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Thank you for your attention to my concerns. Instead of all this greenhouse gas creating energy "development" **put your energies into developing wind and solar power.** We have done so and it works wonderfully. Best of all, except for the one-time consumption of energy it took to make our panels and windmill, it feels so deeply satisfying to know that when we use electricity we are hurting nothing! This is good for the human heart and soul, not to mention our budget.

7

Sincerely,

Marya Grathwohl

SEA's Responses to Comment Letter P37
Marya Grathwohl (December 3, 2004)

- P37.1 Comment noted. See Master Response 9, Determination of Public Convenience and Necessity.
- P37.2 Please see Master Response 16, The Need for a New EIS, and Master Response 21, Adequacy of Cumulative Analysis.
- P37.3 As detailed in the Draft SEIS in Section 4.3.7, Air Quality, SEA believes the imposition and implementation of recommended Mitigation Measures 69 through 73 adequately reduce the impacts of the construction and operation of the rail line on the air quality of the Tongue River Basin.
- P37.4 The effect of the proposed rail line upon the Tongue River hydrology and water quality was thoroughly analyzed in the Draft SEIS. For additional discussion on this issue, please refer to Master Response 12, Effects of the Project on Erosion and Sedimentation Rates, and Master Response 20, Total Maximum Daily Load (TMDL).
- P37.5 The Draft SEIS notes in Chapter 8.0 that conversion of land to railroad uses would be a significant unavoidable effect associated with the project. Recommended Mitigation Measures 1 through 5 address impacts to ranching operations, including direct and indirect loss of land, fencing, cattle passes, displacement of capital improvements, and impacts during construction. Under these mitigation measures, TRRC would be required to consult with individual land owners to minimize the disturbance to ranching activities through avoidance, replacement, or compensation for the loss of land or productivity.
- P37.6 The purpose and need for the project is presented in Chapter 2 of the Draft SEIS. For further discussion, please see Master Response 9, Determination of Public Convenience and Necessity. For a discussion of the effect of the project on existing Montana coal mines, please see Master Response 11, Loss of Competitive Advantage Held by Montana Coal.
- P37.7 Comment noted.



Charles F. Gauvin
President
Chief Executive Officer

December 6, 2004



Surface Transportation Board
Case Control Unit
Washington, DC 20423
Attn: Kenneth Blodgett5
STB Docket No. FD 30186 (Sub-No. 3)

Re: Trout Unlimited's Comments on STB's Tongue River III DSEIS

Dear Mr. Blodgett:

Trout Unlimited's mission is to conserve, protect, and restore North America's coldwater fisheries and their watersheds. Trout Unlimited was founded in 1959 in Grayling, Michigan on the banks of the Au Sable River. From this beginning, Trout Unlimited has grown to a national organization with 135,000 members in 35 state councils and 500 local chapters. Trout Unlimited has western offices in Montana, Wyoming, Washington, Colorado, Oregon, Utah, California, and Idaho.

We are concerned about the effects that the Proposed Western Alignment described in the Tongue River III Draft Supplemental Environmental Impact Statement (DSEIS) and the proposed realignment to the Tongue River I and Tongue River II projects will have on the coldwater fisheries located in the Tongue River Basin. This letter serves both as an expression of our concern about the project and the sufficiency of the DSEIS.

I. THE PROPOSED ACTION NEGATIVELY AFFECTS AQUATIC RESOURCES

There are important aquatic resources in the Tongue River Basin. The STB's Section of Environmental Analysis (SEA) acknowledges that there are extensive coldwater fishery resources in the vicinity of the Western Alignment and that the Tongue River Reservoir is critical to the fishery. The Tongue River Basin supports 44 fish species – 37 of which are present in the area affected by the Western Alignment. The Proposed Action would bring the rail line closer to the River than the approved Tongue River II route. The increase in sedimentation in

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Washington, D.C. Headquarters: 1300 North 17th St., Ste. 500, Arlington, VA 22209
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the river as a result of the Western Alignment could prove problematic for aquatic resources. The new route would increase the number of non-perennial stream crossings, nearly double the volume of earth moved (by seven million cubic yards) and double the potential increase in sediment load (tons/year) in the Tongue River. DSEIS xxi.

1 cont.

The Western Alignment would threaten the fishery. The SEA concedes that the Proposed Action would increase sedimentation and increase the potential for toxic spills and loss of habitat as a result of increased restrictions to the floodplain. DSEIS 4-70. While it is clear that this will have a serious impact on aquatic resources and coldwater fisheries in particular, the SEA recommends proceeding with the Western Alignment even though "[c]omplete information is not yet available on the potential impacts to fish species." DSEIS 4-90. The information that does exist clearly indicates that trout will be particularly impacted by construction activities. Trout are likely to see an increase in gill irritation as a result of the sedimentation. *Id.* The permanent loss of spawning areas seems certain. *Id.*

2

Moreover, the DSEIS purports to re-evaluate portions of the Tongue River I and II EISs. The DSEIS concludes that there have not been changes to the fisheries habitat in the portions of the project evaluated by Tongue River I and Tongue River II since the previous EISs were prepared. Yet this analysis is based on aerial photos from 1997. With no more analysis than a seven year old aerial photo, the SEA concludes that "it is difficult to make conclusive determinations" but assumes that "new proposed mitigation would adequately address the changes in instream fisheries." DSEIS 5-12. These assumptions do not constitute environmental analysis. Until the environmental analysis of the fisheries is started, let alone complete, it seems premature to approve the Western Alignment or the realignment of the Tongue River I and II projects.

3

While cognizant and appreciative of the many mitigation measures that the SEA lists in the DSEIS, Trout Unlimited is concerned that there is no mechanism to enforce the mitigation measures. Even if enforced, there is little discussion in the DSEIS of the efficacy of the mitigation measures with respect to the fisheries and related habitat. Without additional data and analysis on the impact of the Western Alignment to fisheries and related habitat, or on the efficacy and impact of the mitigation measures it appears inappropriate to approve the Proposed Action.

4

II. THE PROPOSED ACTION NEGATIVELY AFFECTS WATER QUALITY

Although relative to other watersheds the Tongue River is fairly clean, the present water quality of the Tongue River and the Tongue River Reservoir does not fully support the identified beneficial uses. One of the beneficial uses is as a coldwater fishery. To that end, the State of Montana has assigned TMDLs to prevent further deterioration of water quality and to improve the hydrology of the Basin. Trout Unlimited believes that any action approved by the STB should ensure that the water quality of the Tongue River Watershed is not diminished.

Despite its recognition that the Tongue River watershed needs improvement, the SEA recommends approval of a project that it concludes would "increase sediment loads and suspended solids due to (1) active construction in waterways during installation of bridges and culverts; (2) changes in surface water patterns and shallow aquifer flow patterns due to topographic and drainage-pattern changes (e.g. cut and fill and the crossing of drainages); and (3) the temporary effects of water consumption for dust suppression." DSEIS 4-108. Likewise, diesel fuel spills, coal spills and herbicides, applied during operation and maintenance activities, are possible and would negatively affect the water quality of the Tongue River and Tongue River Reservoir.

Trout Unlimited remains concerned that the DSEIS does not adequately evaluate the changes in the hydrology and water quality of the Tongue River since the Tongue River I and II EISs were completed. It appears that the extent of the analysis is a notation that the new alignment will be further from the river and thus "the proposed Tongue River I and Tongue River II alignment would not affect the normal variations in streamflows that occur in the Tongue River Valley and that no mitigation is required to address variations in streamflows." DSEIS 5-15. The effects of site-specific location changes in alignment should be evaluated before approval – while distance on a map may appear to indicate less of an impact, this is not necessarily indicative of the change's impact to the Tongue River. Site-specific hydrology corresponding with the changes in the alignment must be addressed.

Again, the DSEIS has few details on the efficacy and enforceability of the proposed mitigation measures. Without that level of detail the public is left without the ability to fully evaluate the environmental impacts of the project.

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Trout Unlimited urges further investigation and analysis before approval of the Proposed Action.

6 cont.

III. STB'S ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF THE WESTERN ALIGNMENT VIOLATES THE NATIONAL ENVIRONMENTAL PROTECTION ACT.

The analysis of environmental impacts of the Proposed Action in the DSEIS is inadequate as it fails to take the requisite "hard look" at the Proposed Action's effect on water quality and aquatic resources. It appears that the DSEIS relies heavily on the Tongue River I and Tongue River II EISs to discuss potential impacts, but only addresses effects of realignment in Tongue River I or Tongue River II and the proposed Western Alignment in general terms. NEPA requires more than general statements. *Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). Moreover, the DSEIS suggests that the fishery analysis is self-avowedly incomplete – the DSEIS must do more than identify potential environmental impacts, it must establish the magnitude and intensity of the impact. *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 743 (9th Cir. 2001).

7

SEA's reliance on the 1986 and 1996 Tongue River I and II proposals is inappropriate. The analysis in the underlying environmental impact statements for Tongue River I and Tongue River II proposals, which were relied upon by the STB in the present DSEIS, is outdated. Concluding that virtually nothing had changed since 1986, SEA conducted only a "focused review" of its prior EISs and addressed only changes in the proposed project. See, e.g., DSEIS at 3-6 to 3-7; DSEIS at 3-9. Yet SEA's conclusion that nothing has changed appears unreasonable is contrary to the facts. SEA offers only conclusory statements in support of its reliance on the previous EISs. See DSEIS at 3-7 ("SEA's analysis of environmental circumstances and environmental regulations and laws determined that little has changed since the EIS was prepared for Tongue River I."). The DSEIS should be supported by evidence that the agency has made the necessary environmental analysis. See 40 C.F.R. § 1502.1; *Citizens Against Toxic Sprays, Inc. v. Bereland*, 428 F. Supp. 908 (D. Ore. 1977). The Tongue River III comparison between current conditions and conditions at the time of each of the previous EISs focuses chiefly on aerial photography comparisons and some limited site visits and does not adequately evaluate potential differences. See, e.g., DSEIS at 3-6 to 3-7; 3-9.

SEA's reliance on Tongue River I and Tongue River II has led it to ignore or fail to adequately discuss:

- New baseline conditions. *See, e.g.*, 40 C.F.R. § 1502.15; *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).
- "Reasonably foreseeable development," which also has changed dramatically since 1986. *See, e.g.*, 40 C.F.R. §§ 1508.7; 1508.8; 1502.1.
- Changes in current area activities, resulting in changes to direct, indirect and cumulative impacts. *See, e.g.*, 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.
- Changes in the environment and resources subject to the project's impacts (e.g., changes in endangered, threatened and sensitive species, changes in air and water quality, etc.). *See, e.g.*, 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.
- A "no action alternative." The DSEIS does not separately address the no action alternative but relies completely on the old EISs in violation of NEPA. *See* 40 C.F.R. § 1502.14(d).

8

These issues should be fully addressed in the DSEIS. Without this information it is difficult for Trout Unlimited, indeed the entire public, to fully and fairly evaluate the proposed action.

By evaluating the proposed railroad in three stages the SEA has effectively segmented the project in violation of NEPA. SEA conducted three separate EISs, at three very different times, covering separate areas and aspects of the project. Because SEA failed to update the old EISs or cumulatively analyze the impacts of the three segments of the project, SEA's analysis contravenes NEPA's requirements. Indeed, the wisdom of the prohibition against segmenting is evident here. In the present situation the project has changed dramatically over 20 years with no systematic evaluation of the entire project. If STB does approve the Proposed Action, the Tongue River Railroad will have been effectively approved without a systematic environmental review.

9

NEPA requires the government agency conducting the environmental review to fully evaluate and quantify the effects of mitigation measures. Not only is that analysis absent from the DSEIS, the DSEIS is silent as to enforcement

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mechanism other than the goodwill of those constructing the railroad. NEPA requires more. *See, e.g., Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Without this mitigation analysis, the public will not have adequate tools to evaluate the project.

10 cont.

As expressed above, Trout Unlimited has reservations about the impact of the Proposed Action on aquatic life and water quality. The analysis provided in the DSEIS appears perfunctory and shallow, leading, in our opinion, to a DSEIS that violates the spirit and letter of NEPA.

11

Sincerely yours,



Charles F. Gauvin

SEA's Responses to Comment Letter P38
Charles Gauvin (December 6, 2004)

- P38.1 The Draft SEIS includes a thorough analysis of the potential increases in erosion and sedimentation of the Tongue River as a result of the project. For further discussion, please refer to Master Response 12, Effects of the Project on Erosion and Sedimentation Rates.
- P38.2 The Draft SEIS notes that the implementation of SEA's recommended mitigation measures would reduce erosion and sedimentation rates to near existing levels. Based on this analysis, the Draft SEIS properly concludes that neither the proposed Western Alignment nor the Four Mile Creek Alternative would result in substantial adverse effects on erosion or water quality. For further discussion, please refer to Master Response 12, Effects of the Project on Erosion and Sedimentation Rates.
- P38.3 The primary purpose of the SEIS is to assess the effects of the proposed Western Alignment and to determine whether they would be greater than the effects of the approved Four Mile Creek Alternative. The Draft SEIS concluded that the erosion and sedimentation rate would be similar for both alternatives with the implementation of mitigation as recommended in Mitigation Measures 34, 35, 36, 39, 40, and 41 (addressing aquatic habitat, aquatic mitigation, potential stormwater pollution, slumping, erosion, and sediment delivery, respectively). Because the erosion and sedimentation rate would be similar between the two projects, the effect on in-stream fish habitat, if any, would also be similar. Section 5 of the SEIS consisted of a focused review of Tongue River I and Tongue River II and an analysis of proposed refinements in Tongue River I and Tongue River II that warrant further environmental review. In a large stream such as the Tongue River, substantial alterations in aquatic habitat conditions over a 200-mile reach are not likely to occur in the time period between these environmental documents unless a large event has occurred, such as installation of a new dam, a major landslide into the river, a major flood, a large fire, or significant changes to operation of upstream dams. No such events have occurred during the intervening period. Aerial images would reveal substantial alterations of this nature, and examination of suitable aerial images can also provide information on the extent of aquatic habitat types, distribution of elements such as woody debris, and even information about the quality of the habitat if the images are sufficiently large-scale and the water is sufficiently clear. The conclusion of the focused review was that there did not appear to have been any changes in in-stream fisheries habitat in the Tongue River since the analyses conducted for Tongue River I and Tongue River II. The turbidity of the river does make it difficult to make conclusive determinations, but mitigation measures have been developed to address any impacts from the proposed project. For further discussion, please refer to Master Response 2, Biological Resources – Conclusions and Mitigation.

P38.4 Please see Master Response 7, Enforcement of Mitigation Measures.

P38.5 The Draft SEIS acknowledges that, without mitigation, both the proposed Western Alignment and Four Mile Creek Alternative would result in temporary adverse effects to hydrology and water quality during construction, including increases in sediment loads and total suspended solids related to construction in waterways, changes in surface water patterns, and effects related to water consumption for dust suppression. The primary purpose of the SEIS is to assess the proposed Western Alignment and to compare the potential effects of the proposed Western Alignment to the effects of the approved Four Mile Creek Alternative. The Draft SEIS properly concludes that, with SEA's recommended mitigation, the effects of both alignments would be similar, and that potential impacts on hydrology and water quality could be reduced through the implementation of recommended Mitigation Measures 40, 41, and 43, which would require that TRRC evaluate its construction plans (i.e., cut and fill locations) with regard to the plan's effect on erosion and sedimentation at the Tongue River and the Tongue River Reservoir. Please refer to Master Response 12, Effects of the Project on Erosion and Sedimentation Rates, for additional information, as well as Master Response 20, Total Maximum Daily Load (TMDL).

P38.6 The commenter is concerned that there is no adequate enforcement mechanism for the mitigation measures identified in the SEIS. Please refer to Master Response 7, Enforcement of Mitigation Measures, for additional discussion.

P38.7 The commenter is concerned that the analysis presented in the Draft SEIS does not adequately examine the potential effects that this project could have on the environment. Specifically, the commenter expresses concern regarding the focused review that was conducted for Tongue River I and Tongue River II and the potential impacts on fisheries in the Tongue River.

It is entirely appropriate for SEA to have used information from Tongue River I and Tongue River III, when appropriate, and to update information from past cases where circumstances have significantly changed. Please refer to the following Master Responses for a complete discussion of these issues raised in the comment:

- Master Response 1, Adequacy and Timing of Studies
- Master Response 2, Biological Resources – Conclusions and Mitigation
- Master Response 16, The Need for a New EIS

P38.8 The comment states that the focused review of Tongue River I and Tongue River II in the Draft SEIS has failed to adequately account for new baseline conditions, including changes to biological resources, reasonably foreseeable development, and current activities in the region that could result in cumulative impacts, and

alleges that there is no discussion of a “no-action” alternative, as required under NEPA.

Regarding the analysis of new baseline conditions in the project area, SEA has made an extensive effort to ensure that its baseline information is up to date. Please refer to Master Response 1, Adequacy and Timing of Studies. Regarding foreseeable development and current area activities, please refer to Master Response 21, Adequacy of Cumulative Analysis. Regarding the inclusion of a “no-action” alternative in the Draft SEIS, please refer to Master Response 3, The No-Action Alternative.

P38.9 The comment states that SEA has improperly segmented the project by completing three separate environmental reviews for Tongue River I, Tongue River II, and Tongue River III. For a discussion of the scope of each of these proposals and why three separate analyses (EISs) were conducted, please refer to Master Response 8, Scope of EIS is too Narrow.

P38.10 The commenter suggests that an evaluation and quantification of the effects of mitigation measures is required as part of the project. SEA acknowledges that it is important to monitor mitigation measures. A quantitative evaluation (numerical rating) of the effectiveness of each measure is not feasible until a measure has actually been imposed and implemented and there is some time period by which to evaluate its efficacy. For a discussion of the framework that SEA has established to ensure that all measures the Board might impose are implemented as intended and monitored for effectiveness, please refer to Master Response 7, Enforcement of Mitigation Measures.

P38.11 Comment noted.

*Musgrave Ranch
P.O. Box 32
Decker, MT 59025*



December 1, 2004

Comments pertaining to STB Docket No. FD 30186 (Sub-No. 3):

We are residents of Big Horn County Montana where our home site is three miles below the Tongue River Dam along the Tongue River. It is located about one mile from the Tongue River Railroad's proposed Western Alignment – depending on where the final location of the track is in the proposed 3,000 foot corridor. According to the draft SEIS, there are zero noise receptors along the proposed Western Alignment. We and our neighbors object to that premise as we will certainly be impacted by railroad construction and operation noise. We will also suffer impact from increased traffic, air and water pollution, weeds and destruction of our view shed.

1

The more than 130 mile Tongue River Railroad has been studied in such a piecemeal fashion that the STB has no idea what the project's impacts as a whole will be on the Tongue River Valley or its residents. There is no baseline data on wildlife populations or habitat in this SEIS, and it attempts to rely upon biological inventories completed over 20 years ago. These studies are not only out of date, but they also cover only a small percentage of the proposed railroad route - leaving vast areas unstudied. There is no doubt that, before granting any TRR permits, the STB needs to complete a new NEPA (National Environmental Protection Agency) analysis reflecting changes that have occurred in the valley since the EIS was drafted in 1984.

2

For instance, this SEIS fails to take into account the cumulative effects of the TRR with the predicted significant environmental impacts from CBM development in the area. Powder River Gas has received permits for their first 16 wells in their Coal Creek Project and is expected to begin drilling as soon as January, 2005, along the upper end of the proposed Western Alignment. They are also permitted to dump "treated" water into the Tongue River using a Higgins Loop. The Statewide CBM FEIS predicts that CBM, in and of itself, will cause air and water quality standards violations, cause substantial population-wide impacts on numerous species of wildlife including bald eagles and adversely impact millions of acres of wildlife habitat. The TRR will increase these impacts many times over.

3

The proposed 17 mile Western Alignment would require moving 17.3 million cubic yards of fill material consisting of rock and high sodium soils. That is an average of more than one million cubic yards per mile. What will that do to air quality and the already fragile Tongue River? What level of erosion will that cause? How can moving a million cubic yards of dirt and rocks a mile be mitigated? How can we pretend that that will be okay with Mother Nature? Remember that the E in EIS and NEPA stands for Environment.

4

There is no way that the Tongue River Valley environmental and cultural resources can be evaluated by doing a fly over any more than someone can say they have visited our nation's capital by flying over it. The evaluation needs to be done on the ground by an unbiased agency with input from Valley residents. An on-the-ground evaluation of a piece of our property near the proposed Western Alignment was conducted by Western Land Services for Powder River Gas a year ago. They found 19 new prehistoric sites, 3 historic sites and 9 prehistoric isolated finds within the studied project area. According to this SEIS, no on-the-ground studies will be done until **after** the permit is issued. Does that make sense in light of the heavy concentration of Native American occupancy of this area along the Tongue River for hundreds of years?

5

And, finally, hasn't it been long enough? According to this SEIS, the TRR has been permitted from Miles City to Ashland since 1985 and from Ashland to Decker since 1996. The company has been free to obtain right-of-ways from landowners and begin construction for nearly 20 years. Instead of moving forward with the project, the company has done little but try to sell its scheme to investors. Meanwhile, Tongue River Valley residents have been forced to live under the shadow of an unneeded but permitted railroad and its associated impacts creating a clouded title to our property.

6

We urge the STB to approve only a "no build" alternative for the proposed TRR Western Alignment.

7

Thank you for your attention to our comments.

Bill Musgrave

Bill Musgrave

Judy Musgrave
Judy Musgrave

SEA's Responses to Comment Letter P39
Judy and Bill Musgrave (December 1, 2004)

P39.1 The ROW for the rail line is 400 feet wide, including 200 feet on either side of the centerline. The 3,000-foot corridor referenced in the comment refers to the area surveyed for cultural resources. As stated in the comment, the residence of concern is located approximately 1 mile (5,280 feet) from the proposed Western Alignment. In a worst case scenario, the centerline would shift 400 feet closer to the residence, in which case it would still be 4,880 feet from the proposed rail line. Based on the noise contour data presented in Table 4-38 of the Draft SEIS, the residence would be well outside the noise contours established for the proposed Western Alignment and the Four Mile Creek Alternative. As shown in Tables 4-37 and 4-39 of the Draft SEIS, SEA has identified one sensitive receptor along the proposed Western Alignment for the construction and operation phases. Regarding construction noise, Section 4.3.8.2 of the Draft SEIS states that sensitive receptors would be affected by the operation of heavy machinery during construction of either alignment, which would temporarily increase noise levels in the construction area. Using a worst-case assumption that all construction equipment would be operating at the same time, the 65 dBA L_{dn} corridor for construction would extend out 500 feet. The noise from construction would range between 62 and 74 dBA at a 500-foot distance, and between 54 and 67 dBA at a 2,000-foot distance. The noise generated would be similar for both alignments; however, the approved Four Mile Creek Alternative would affect more receptors (four) than the proposed Western Alignment (one).

Recommended Mitigation Measures 74 and 75 are designed to address potentially adverse effects related to construction noise. Assuming imposition and implementation of these measures, SEA concludes that effects from construction noise would not be significant. Potentially adverse effects and mitigation related to traffic, air and water pollution, weeds, and aesthetics are discussed in the Draft SEIS Sections 4.3.6, 4.3.7, 4.3.4, 4.3.3, and 4.3.11, respectively.

P39.2 The issues raised in this comment of the Draft SEIS are addressed in Master Response 2, Biological Resources – Conclusions and Mitigation, and in Master Response 16, The Need for a New EIS.

P39.3 The Draft SEIS included a thorough analysis of the cumulative effects of the proposed rail line in conjunction with other reasonably foreseeable developments. For additional discussion, please refer to Master Response 21, Adequacy of Cumulative Analysis.

P39.4 The Draft SEIS included a thorough analysis of the potential increases in erosion and sediment delivery to the Tongue River. The SEIS includes mitigation measures that would reduce the potential erosion rates to near existing levels. Please refer to Master Response 12, Effects of the Project on Erosion and Sedimentation Rates, for a complete discussion.

- P39.5 See Master Response 1, Adequacy and Timing of Studies, regarding the utilization of aerial surveys and photography. As stated in Section 4.2.5.3 of the Draft SEIS, the PA requires completion of detailed on-the-ground surveys of the railroad ROW prior to construction; development of a Treatment Plan, in consultation with the parties to the PA; and procedures for reviewing and addressing objections and/or disagreements. The new PA will replace the previous PA developed for Tongue River II. The PA has been signed by all parties, and a copy is included in this Final SEIS as Appendix C. The PA identifies the framework for on-site ground surveys that would be required prior to construction.
- P39.6 The purpose and need for the project is discussed in Chapter 2 of the Draft SEIS. Please also refer to Master Response 9, Determination of Public Convenience and Necessity, for further discussion.
- P39.7 Comment noted.

Joan L. Brownell

3203 Country Club Circle Billings, MT 59102

voice: (406)254-2601 fax: 406-256-7526 email: jbrownel@18ocom.net

5 December 2004

Surface Transportation Board
Case Control Unit
Washington, D. C. 20423

RE: STB Docket No. FD 30186 (Sub-No. 3)
Tongue River Railroad

To whom it may concern:

This letter is written in protest of the proposed Tongue River Railroad now under consideration by the Surface Transportation Board. It is my strong belief that this railroad is not necessary and will disturb one of Montana's pristine cultural landscapes and turn the Tongue River Valley into an industrial zone.

1

In the past few years, I have had the opportunity to conduct historic research in relation to the Tongue River Valley for both state and federal agencies. My research has involved studying both the ranching history and Northern Cheyenne history in the Tongue River Valley and therefore has allowed me to understand the importance of the valley from two different perspectives.

The Northern Cheyennes traveled, hunted and camped extensively in the Tongue River Country, particularly in the latter half of the nineteenth century. One of the pivotal battles of the Great Sioux War, the Battle at Belly Butte, occurred along the Tongue River in early 1877. Beginning in 1881 and for almost 20 years, Northern Cheyenne families lived on the east side of the Tongue River and considered the right to homestead these lands a promise to them by the United States government. Although removed from the east side in 1900, many Northern Cheyenne today feel that the land was only leased temporary to the government and should have been returned to the Northern Cheyenne.

2

The Northern Cheyenne homesteads that existed within the valley bottom along the east side of the Tongue River are important to the Northern Cheyenne people as many think of it as their "homeland." Further investigations should determine the locations of these homesteads along the Tongue River and the sites protected. According to Bill Tallbull, the late tribal historian, the Tongue River served as their last refuge and a "place where they were able to survive and come together as a people." The valley is therefore a significant cultural landscape to the Northern Cheyenne people.

The Tongue River Valley also is a significant cultural landscape to the ranching community who settled along the Tongue River Valley beginning in the early 1880s. It is

3

this isolated, rough dry terrain where ranching families have struggled to survive for over 100 years. The Bones Brothers Ranch on Hanging Woman Creek, a tributary of Tongue River, recently has been listed on the National Register of Historic Places. This ranch reflects the evolution of the livestock industry and land settlement of the Tongue River Valley and also operated for many years as a dude ranch. Settled in the late nineteenth century, the Bones Brothers Ranch and others, like the Quarter Circle U Ranch and the Three Circle Ranch, are just a few of the historic ranches still operating within the Tongue River Valley. The significance of these historic ranches along the Tongue River needs to be properly addressed. There are only a few valleys in Montana that have the ability to reflect their historic ranching heritage as strongly as the Tongue River Valley.

3 cont.

The cultural and environmental impacts of this proposed railroad will affect both the historic ranching community and the Northern Cheyenne people. Both peoples hold strong cultural ties to this landscape. The numerous threats that the proposed Tongue River railroad presents to the environment that composes this landscape in terms of air and water quality, wildlife and fisheries need further study. Today, there are few visual intrusions to the landscape of the Tongue River Valley that affect its historic values.

4

Under the Historic Preservation Act, the historic resources of the Tongue River Valley have not received adequate investigation and evaluation. None of these historic resources have been thoroughly considered relative to the undertaking of the construction of the railroad. The existence of several National Register properties, including the Bones Brothers Ranch and Wolf Mountains Battlefield (Battle at Belly Butte) sets a precedent for recognition of the cultural landscape of the Tongue River. The introduction of the Tongue River railroad will destroy the historic relationships held by both the Northern Cheyenne people and the ranching community within the Tongue River Valley.

5

I ask you to give due recognition to the cultural landscape of the Tongue River Valley. The numerous irreversible impacts of this proposed railroad to the cultural landscape of the Tongue River Valley are not acceptable. In the climate that our country lives in today, it is important to recognize and protect these places that still reflect our cultural heritage.

Thank you for the opportunity to comment.

Sincerely,



Joan L. Brownell

SEA's Responses to Comment Letter P40
Joan L Brownell (December 5, 2004)

- P40.1 Comment noted. For additional discussion, please see Master Response 9, Determination of Public Convenience and Necessity.
- P40.2 To ensure proper identification of cultural resources associated with the construction and operation of the Tongue River Railroad, SEA developed a PA that will cover the entire rail line. The PA guides and regulates the procedures by which the identification and treatment of cultural resources will occur. These investigations will include identifying and evaluating prehistoric, historic, and/or traditional cultural sites, districts, or landscapes, which may include Northern Cheyenne homesteads. Based on the results of these investigations, a detailed Treatment Plan, in consultation with the parties to the PA and the Native American community will be developed and implemented. The PA developed for Tongue River III would replace the previous PA developed for Tongue River II and would apply to construction of the entire rail line from Miles City to Decker. The PA has been signed by all parties. The fully executed PA is included in this Final SEIS as Appendix C.

The Wolf Mountain Battlefield is located within the approved Tongue River II route. The boundary of the Wolf Mountains Battlefield in relation to the rail alignment is shown in Figures A-71 to A-73 in Appendix A of this Final SEIS. This site has significant, rare, and irreplaceable historical and cultural value of national significance, and was placed on the National Register of Historic Places in 2001. The construction of the railroad through this site will be a negative impact. Both the Four Mile and the proposed Western alignments begin immediately to the west of the Wolf Mountain Battlefield. These alignments would not directly disturb this site, but could have a visual effect. A method to mitigate the effect of the railroad is required by the PA.

- P40.3 Historic ranches are identified in Table 4-26 in Section 4.3.5.2 of the Draft SEIS. Additional ranches of historical significance may be identified during additional on-the ground surveys, as required by the PA. The Bones Brother Ranch is a historic district that was listed on the National Register of Historic Places in March of 2004. It is significant under Criterion A of the National Register's standards for its association with the evolution of the livestock industry and the land settlement of the Tongue River Valley, and for its association with the development of tourism and dude ranching in Montana. The district is also listed under Criterion C for its vernacular rustic architecture.

The Bones Brothers Ranch district incorporates 4,000 acres. The northeast corner of this district is approximately ½ mile from the approved rail line. Although the approved rail line would be visible from the higher elevations within the district boundaries, the main complex of buildings is over 1 mile away, and the line of sight is blocked by intervening topography. The construction of the railroad will

not directly or indirectly impact the elements of the site that make this district NRHP eligible. The border of the Bones Brothers Historic District in relation to the proposed rail line is shown on Figure A-69 in Appendix A of this Final SEIS.

- P40.4 SEA has conducted extensive outreach to the Northern Cheyenne Tribe, as documented in Section 1.6.3 of the Draft SEIS; as detailed in the PA located in Appendix C of this Final SEIS, will abide by the provisions of the American Indian Religious Freedom Act (AIRFA) throughout construction of the project and for a period thereafter determined to be appropriate.

Regarding the need for further study, please refer to Master Response 16, The Need for a New EIS.

Regarding the potential for visual changes, SEA acknowledges in the Draft SEIS and this Final SEIS that cuts and fills needed for this rail line would alter the existing visual setting, especially within the Tongue River Canyon where the rail line would be visible intermittently from public roads. As stated in Section 4.3.11.2 of the Draft SEIS, SEA is recommending that the same mitigation measures previously imposed in Tongue River II be applied to the proposed Western Alignment. SEA is also recommending additional measures in this SEIS that would establish a process for the revegetation of disturbed slopes. These measures would make disturbed slopes less visible, and would make them blend in with adjacent undisturbed areas.

- P40.5 The commenter states that the Tongue River Valley potentially could be recognized as a cultural landscape. A cultural landscape is a geographic area that reflects human adaptation and use of natural resources. The character of a cultural landscape is defined by both physical properties and by the use of patterns that reflect cultural values and traditions. The cultural resource properties possess tangible features, called landscape characteristics, which have resulted from historic human use.

The primary purpose of the SEIS is to assess the anticipated impacts of the proposed Western Alignment and to compare those potential effects to the effects that would result from the construction of the alignment adopted in Tongue River II. The potential effects to Wolf Mountain Battlefield are evaluated and the results are presented in the Draft SEIS in Section 5.3.5. For further discussion, please refer to Master Response 14, Effect of the Project on Battle Butte Battlefield.

To ensure proper identification of cultural resources from the construction and operation of the Tongue River Railroad, SEA developed a PA that will cover the entire rail line. The PA guides and regulates the procedures by which the identification and treatment of cultural resources would occur. The PA includes requirements for additional surveys of the entire rail line ROW from Miles City to Decker. These additional surveys will identify and evaluate prehistoric, historic,

and/or traditional cultural sites, districts, or landscapes along the entire rail line, prior to construction of the relevant portion of the line. The PA also requires the development of a detailed Treatment Plan in consultation with the parties to the PA and the Native American community, and establishes procedures for reviewing and addressing objections and/or disagreements.

December 6, 2004

Art Hayes Jr.
The Brown Cattle Co.
PO Box 517
Birney, MT 59012

Surface Transportation Board
Case Control Unit
Washington, DC 20423
Attn: Kenneth Blodgett
STB Docket No. FD 30186 (Sub-No. 3)

Re: The Brown Cattle Co.'s Comments on STB's Tongue River III DSEIS

Dear Mr. Blodgett:

Thank you for the opportunity to review and provide comments to the Draft Supplemental Environmental Impact Statement (SEIS) concerning the construction and operation of the proposed Tongue River Railroad - Western Alignment.

I am a rancher with property affected by the proposed Tongue River Railroad. The Brown Cattle Co. will have about five miles of the Tongue River Railroad crossing its private and leased lands. I have lived in the area for sixty years and rely on the ranch for my family's continued livelihood. The environmental well-being and natural resources in the Tongue River Valley are vital to my ranch and to my community, and I believe that the Proposed Action will damage both.

I am deeply concerned about the effects that the Proposed Western Alignment described in the Tongue River III Draft Supplemental Environmental Impact Statement (DSEIS) and the proposed realignment to the Tongue River I and Tongue River II projects will have on the environment of the Tongue River Basin and the related communities including my ranch. This letter serves as an expression of my concern both about Tongue River III and the sufficiency of the DSEIS in reviewing all relevant matters, including the re-opening of only portions of Tongue River I and II. Relying on EIS' completed in 1986 and 1996 as the basis for some of the Board's actions have provided incomplete data at best. I am also deeply concerned about the lack of enforceable measures included in this DSEIS. Allowing the railroad to move ahead without an in-depth study of the environmental and economic impacts as well as the lack of any enforcement

mechanisms if the railroad does not undertake the actions recommended by the Board are unacceptable in my view.

Understanding that the Board is committed to ensuring the safety and environmental soundness of our home, I respectfully urge the Board to complete a new environmental analysis of the entire line before any action, including this Proposed Action be approved by the board. I also respectfully urge the Board to strengthen their oversight of the railroad to include tangible enforcement mechanisms to ensure that the Board's recommended mitigation measures are met to the letter of the law.

4

I. THE PROPOSED ACTION NEGATIVELY AFFECTS THE TONGUE RIVER AND THE TONGUE RIVER RESERVOIR.

We rely on the water of the Tongue River and Tongue River Reservoir for irrigation and other ranch uses, including that of the health and well being of our livestock. The Proposed Action would actually bring the rail line closer to the River than of the originally approved Tongue River II route. The increase in sedimentation in the river as a result of the Western Alignment could impair the water used on my ranch. The new route would increase the number of non-perennial stream crossings, nearly double the volume of earth moved (by seven million cubic yards) and double the potential increase in sediment load (tons/year) in the Tongue River. Much of the soil and rock that will make up the cut and fill of the Tongue River Railroad's bed contains high amounts of sodium. Sodium is highly water soluble and toxic to plants and aquatic life. Rain and snow run-off from the rail bed will greatly increase the amount of toxic salt in the Tongue River—The river that we rely on for irrigation water.

5

The State of Montana, recognizing the present water quality problems of the Tongue River, has assigned TMDLs to prevent further deterioration of water quality and to improve the hydrology of the Basin. Despite the recognition that the Tongue River watershed needs improvement, the SEA recommends approval of a project that it concludes would "increase[] sediment loads and suspended solids due to (1) active construction in waterways during installation of bridges and culverts; (2) changes in surface water patterns and shallow aquifer flow patterns due to topographic and drainage-pattern changes (e.g. cut and fill and the crossing of drainages); and (3) the temporary effects of water consumption for dust suppression." DSEIS 4-108. The Tongue River Water Users Association has a water marketing contract with the State of Montana for agricultural water. There is only seventy-five acre feet of industrial water in the Tongue River Reservoir and that is used by Decker Coal for dust control. In the 2004 water year the members of the Tongue River Water Users Association only received forty-eight percent of their contract water because of continuing drought conditions. The use of water by the railroad would greatly increase this hardship.

6

The Western Alignment would clearly threaten the Tongue River. The SEA concedes that the Proposed Action would increase sedimentation, increase the potential for toxic spills, and cause slumping on the canyon walls. DSEIS 4-99, 4-105 – 4-108. By choosing the Proposed Action, which travels along the Tongue River, the STB has endangered the river. The DSEIS suggests that the construction of the Western Alignment will require substantially more water use during the peak irrigation season (a season during which the River already has a low water level) than the alternative actions. DSEIS 4-115. While the SEA concludes that this will not affect water availability, the DSEIS does not contemplate the change in water quality during this period nor does it provide any site-specific analysis as to flow levels at various points along the river. In fact, while the SEA acknowledges that the Western Alignment crosses more non-perennial streams than other alternatives it provides no analysis as to how the project will affect those streams. DSEIS 4-28. Before approving the Proposed Action, I respectfully request that the Board require a site-specific survey of the impacts of the proposed Western Alignment on the feeder non-perennial, ephemeral and intermittent streams it will cross.

7

I am also concerned that the DSEIS does not adequately evaluate the changes in the water quality and drainage in the Tongue River Basin since the Tongue River I and II EISs were completed. It appears that the extent of the analysis is a notation that the new alignment will be further from the river and thus “the proposed Tongue River I and Tongue River II alignment would not affect the normal variations in streamflows that occur in the Tongue River Valley and that no mitigation is required to address variations in streamflows.” DSEIS 5-15. The effects of site-specific location changes in alignment should be evaluated before approval – while distance on a map may appear to indicate less of an impact, this is not necessarily indicative of the change’s impact to the Tongue River. Site-specific hydrology corresponding with the changes in the alignment must be addressed. Before approving the Proposed Action, I respectfully request that the Board require a site-specific survey of the impacts of the entire Tongue River Railroad project on the Tongue River and Reservoir.

8

The DSEIS assumes away many of the potential harms, which are not quantified or specified, by offering mitigation measures to protect the river. It is hard to understand how the DSEIS can make such assumptions, based on little to no quantitative research. It is also hard to understand how the Board can be assured these mitigation measures will ensure that the railroad will ensure the safe conduct of the environment and our lands when these mitigation measures have no enforcement mechanisms included in them. It is also hard to understand how the SEA assumes that the mitigation measures will be effective without specifying how they will be effective. The language of the Mitigation Measures is clearly unenforceable in it’s current state. Mitigation Measure 49 is described as a mechanism to protect non-perennial streams at railroad crossings by the installation of culverts. SEA states “if imposed and implemented, this mitigation measure would ensure that the impacts resulting from the construction of culverts... would not

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be significant.” DSEIS 4-114. Not only is there no analysis as to how this would be effective, the plain text indicates that implementation and enforcement is questionable.

While cognizant of the many mitigation measures that the SEA lists in the DSEIS, I am concerned that no mechanism to enforce the mitigation measures exists. Even if enforced, there is little discussion in the DSEIS of the efficacy of the mitigation measures with respect to the ensuring that the River remains clean. Without more research, data and analysis on the impact of the Western Alignment to Tongue River Basin, or on the efficacy and impact of the mitigation measures it appears inappropriate to approve the Proposed Action. Before approving the Proposed Action, I request that the Board require analysis which quantifies and specifies the site-specific environmental damage to the river, and describes the enforcement mechanism for the various mitigation measures and how those mitigation measures will work given the specific hydrology of the Tongue River Basin.

10

II. THE PROPOSED ACTION ECONOMICALLY HARMS OUR AREA AND NEGATIVELY AFFECTS THE SAFETY OF THE LOCAL RESIDENTS

As a resident of the Tongue River Basin I am also concerned about the effects of the Railroad on my community. Many of the properties in the region, The Brown Cattle Co. lands, are used for agricultural purposes including grazing of cattle. The Railroad will sever about one third of my property from the rest of my property, which makes grazing cattle difficult as we must then herd the cattle through a tunnel underneath the railroad. This process is time consuming and dangerous to the cattle. It will also force the deer and elk to cross the railroad to get to water and their feeding grounds. Again, there is apparently no recourse for landowners if the railroad decides against building a cattle tunnel. Before approving the Proposed Action, I respectfully request that the Board require an analysis of the effect of severing rancher's grazing lands and include enforcement mechanisms and official recourse for us if the railroad does not undertake the actions requested by the Board.

11

I continue to be deeply concerned that the SEA's analysis of the economic effect of the railroad to be short sighted and unbalanced. The DSEIS is very thorough in its analysis of how building the railroad will benefit the railroad company and increase employment in Sheridan, Wyoming. It is, however, utterly void of analysis of the negative economic effects the Proposed Action will have on the local community, ranchers, farmers and residents near the railroad. I respectfully request that the Board do an in-depth analysis on what the economic harm will be to the ranchers and others in the area by the railroad before it is finally concluded by the Board that it will be a boon to our area.

12

The railroad brings a number of dangers with it as well. Railroad lines, as the SEA acknowledges, spread noxious weeds to the lands they cross and are more likely to start wildfires

13

along their path. DSEIS 4-65. The State of Montana Water Resource Division has also noted their concern for this issue in their filing as well. STB Docket No. FD 30186 (Sub-No.3) November 30, 2004 filing. The DSEIS addresses the wildfire issue by describing potential mitigation measures but does not quantify the risk of wildfires, which I understand to be great. In fact, the SEA only provides percentage risks of fires compared to other sources of fire, but does not provide the needed analysis for accurate public evaluation – how many fires can the Tongue River Basin expect as a result of the Proposed Action? DSEIS 4-65. The SEA suggests that the average railroad fire consumes 90 acres as if this were not a significant risk. *Id.* A 90-acre burn can be a tremendous loss to a rancher and is an extreme danger to cattle. The DSEIS fails to evaluate whether local conditions suggest larger or smaller fires or whether the 90-acre size is appropriate for the Basin. Before approving the Proposed Action, I respectfully request that the Board require an analysis of the actual likelihood of fire and noxious weeds by this railroad in this canyon and to require an explanation of how the mitigation measures will actually prevent fire and the spread of noxious weeds.

13 cont.

Another significant concern is the risk that increased railroad crossings brings to the community. With trains rumbling across roads (both public and private) more than once an hour, delays are inevitable. This is particularly troublesome with regard to emergency vehicles, and is an additional burden on the state and local community to provide the critical service to our area. The SEA acknowledges this concern but suggests that the delays may be minor. Yet, time resulting from these delays can be the difference between life and death in an emergency situation. Moreover, there will be an increase in traffic during construction of the railroad, as numerous workers will be traveling on local roads. The mitigation measures clearly have not taken into consideration the health and welfare of those of us who have lived in this area for generations and are completely inadequate. The SEA suggests that “contractors will be asked to provide central transportation to the work site” and that speed limits would be strictly enforced. DSEIS 4-88, 4-129. Yet, there is no discussion of how these measures will be enforced.

14

Moreover, the environmental justice analysis lacks a thorough discussion about how low-income local residents are hurt proportionately more by the Proposed Action. Also missing from the DSEIS is how the high level of airborne dust and particulate matter as a result of the Western Alignment will affect the health of cattle to which this community’s livelihood is tied.

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III. STB’S ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF THE WESTERN ALIGNMENT VIOLATES THE NATIONAL ENVIRONMENTAL PROTECTION ACT.

The analysis of environmental impacts of the Proposed Action in the DSEIS is inadequate as it fails to take the requisite “hard look” at the Proposed Action’s effect on the

17

environment, Tongue River ranches and the Tongue River community. It appears that the DSEIS relies heavily on the Tongue River I and Tongue River II EISs to discuss potential impacts, but only addresses effects of realignment in Tongue River I or Tongue River II and the proposed Western Alignment in general terms. NEPA requires more than general statements. *Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). Moreover, the DSEIS suggests that the fishery analysis is self-avowedly incomplete – the DSEIS must do more than identify potential environmental impacts, it must establish the magnitude and intensity of the impact. *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 743 (9th Cir. 2001).

17 cont.

SEA's reliance on the 1986 and 1996 Tongue River I and II proposals is inappropriate. The analysis in the underling environmental impact statements for Tongue River I and Tongue River II proposals, which were relied upon by the STB in the present DSEIS, is clearly outdated. Concluding that virtually nothing had changed since 1986, SEA conducted only a "focused review" of its prior EISs and addressed only changes in the proposed project. *See, e.g.*, DSEIS at 3-6 to 3-7; DSEIS at 3-9. Yet, SEA's conclusion that nothing has changed appears unreasonable and contrary to the facts. It is hard to understand how the SEA can assume that environmental conditions have not changed in the 10-20 years since the original EISs were completed. SEA offers only conclusory statements in support of its reliance on the previous EISs. *See* DSEIS at 3-7 ("SEA's analysis of environmental circumstances and environmental regulations and laws determined that little has changed since the EIS was prepared for Tongue River I."). The DSEIS should be supported by evidence that the agency has made the necessary environmental analysis. *See* 40 C.F.R. § 1502.1; *Citizens Against Toxic Sprays, Inc. v. Bergeland*, 428 F. Supp. 908 (D. Ore. 1977). The Tongue River III comparison between current conditions and conditions at the time of each of the previous EISs focuses chiefly on aerial photography comparisons, website searches and agency discussions as well as extremely limited site visits and does not adequately evaluate potential differences. *See, e.g.*, DSEIS at 3-6 to 3-7; 3-9.

18

SEA's reliance on Tongue River I and Tongue River II has led it to ignore or fail to adequately discuss:

19

- New baseline conditions. *See, e.g.*, 40 C.F.R. § 1502.15; *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).
- "Reasonably foreseeable development," which also has changed dramatically since 1986. *See, e.g.*, 40 C.F.R. §§ 1508.7; 1508.8; 1502.1.
- Changes in current area activities, resulting in changes to direct, indirect and cumulative impacts. *See, e.g.*, 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.
- Changes in the environment and resources subject to the project's impacts (e.g., changes in endangered, threatened and sensitive species, changes in air and water quality, etc.). *See, e.g.*, 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.

- A “no action alternative.” The DSEIS does not separately address the no action alternative but relies completely on the old EISs in violation of NEPA. *See* 40 C.F.R. § 1502.14(d).

19 cont.

These issues should be fully addressed in the DSEIS. Without this information it is difficult for the public to fully and fairly evaluate the proposed action and the analysis of the DSEIS.

Despite the DSEIS’ reliance on the Tongue River I and Tongue River II EISs, the DSEIS is silent on why a proposal nearly identical to the present Proposed Action was rejected in Tongue River II in favor of the Four Mile alternative. It cannot be because conditions have changed since that EIS was prepared – the SEA suggests a new analysis of the entire line is not needed precisely because environmental conditions have not changed. There is no analysis as to why the economic reasons touted by the SEA as justification for the Western Alignment were absent in 1996 when it rejected the railroads preferred alternative – a proposal nearly identical to the Western Alignment. The SEA has not provided any explanation on this obvious contradiction and it is difficult to understand why they have completely avoided this issue in an apparently arbitrary manner.

20

By evaluating the proposed railroad in three stages, the SEA has effectively segmented the project in violation of NEPA. SEA conducted three separate EISs, at three very different times, covering separate areas and aspects of the project. Because SEA failed to update the old EISs or cumulatively analyze the impacts of the three segments of the project, SEA’s analysis contravenes NEPA’s requirements. Indeed, the wisdom of the prohibition against segmenting is evident here. In the present situation, the project has changed dramatically over 20 years with no systematic evaluation of the entire project. If STB does approve the Proposed Action, the Tongue River Railroad will have been effectively approved without a systematic environmental review and is in direct violation of NEPA requirements.

21

NEPA requires the government agency conducting the environmental review to fully evaluate and quantify the effects of mitigation measures. Not only is that analysis absent from the DSEIS, the DSEIS is silent as to enforcement mechanism other than the goodwill of those constructing the railroad. NEPA requires more. *See, e.g., Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Without this mitigation analysis, the public will not have adequate tools to evaluate the project.

22

As expressed above, I have serious reservations about the impact of the Proposed Action on the Tongue River Basin environment, my ranch and my community. The analysis provided in the DSEIS appears perfunctory and overly limited in scope, leading, in my opinion, to a DSEIS

23

Surface Transportation Board
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Page 8

that violates the spirit and letter of NEPA. I respectfully request that the Board require a complete study and analysis of the concerns I have raised and require that a new environmental impact study be conducted on the entire railroad line in order to adequately understand the true impacts of the railroad in our community.

I thank the Board for its review and response of these issues as well as the Board's concern and focus that the impacts of the railroad on a community that we have lived in for over sixty years be addressed in a clear and focused manner. There are many complex issues associated with this proceeding, and I appreciate the Board's understanding of the depth and breadth of these impacts.

Regards,

A handwritten signature in cursive script, appearing to read "Art Hayes Jr.", written in dark ink.

Art Hayes Jr. President
The Brown Cattle Co.
PO Box 517
Birney, MT 59012

SEA's Responses to Comment Letter P41
Art Hayes, Jr. (December 6, 2004)

- P41.1 The commenter expresses concerns about how the project would adversely affect operations of his ranch. SEA acknowledges in Chapter 8.0 of the Draft SEIS that conversion of land to railroad uses would be a significant unavoidable effect associated with the project. Recommended Mitigation Measures 1 through 5, however, address impacts to ranching operations, including direct and indirect loss of land, fencing, cattle passes, displacement of capital improvements, and impacts during construction. Under SEA's recommended mitigation, TRRC would consult with individual land owners to minimize the disturbance to ranching activities through avoidance, replacement, or compensation for the loss of land or productivity.
- P41.2 The commenter appears concerned that only certain issues from Tongue River I and Tongue River II have been revisited as part of the Tongue River III environmental analysis. For a discussion of this issue, please refer to Master Response 8, Scope of the Draft EIS is too Narrow.
- P41.3 The commenter is concerned about a lack of framework to ensure that mitigation measures are effectively enforced. For a discussion of this issue, please refer to Master Response 7, Enforcement of Mitigation Measures.
- P41.4 The commenter requests that SEA complete a new EIS that covers the entire route from Miles City to Decker. For a discussion of this issue, please refer to Master Response 16, The Need for a New EIS. The comment also calls for an adequate enforcement mechanism that will ensure the effective implementation of all recommended mitigation measures in the Draft SEIS. Please see response P41.3 above.
- P41.5 The commenter expresses concern that the project could increase sedimentation and salination in the Tongue River, which would adversely affect the quality of water used for irrigation. The issue of sedimentation and erosion is discussed in Master Response 12, Effects of the Project on Erosion and Sedimentation Rates. For a discussion of this issue, please refer to Master Response 7, Enforcement of Mitigation Measures.
- P41.6 The commenter questions why the STB would approve the project even through it would have potentially adverse effects on water quality and availability in the Tongue River, for which the MDEQ has identified water quality concerns and assigned TMDLs. For a discussion of these issues, please refer to Master Response 20, Total Maximum Daily Load (TMDL). For a discussion of water availability, please refer to Master Response 19, Availability of Water During Construction.

P41.7 The commenter suggests that the Draft SEIS does not contemplate the possible changes in water quality during the construction period, when TRRC would draw water from the Tongue River. However, SEA has thoroughly considered the potential impacts of this project related to water quality, and has identified a range of mitigation measures to address those impacts. For a discussion of water quality concerns and issues related to the project, please refer to Master Response 12, Effects of the Project on Erosion and Sedimentation Rates. The comment also states that the Draft SEIS does not provide any site-specific analysis on flow levels for various points along the river. But the application for a water permit from MDEQ containing that sort of information would be prepared as part of the final engineering and design process for this rail line. Completion of the permit application would require that water levels be identified in areas where removal of water is being proposed.

Regarding the request for site-specific surveys on streams, the SEIS includes several recommended mitigation measures that directly address this issue. For example, recommended Mitigation Measure 23 requires that, prior to construction, TRRC, in consultation with the MTDNRC, conduct surveys of ephemeral streams that would be crossed by the railroad to determine the potential impacts of erosion and sedimentation on state species of concern, and consult with MT DNRC on appropriate mitigation. Through recommended Mitigation Measure 24, TRRC would be required to adhere to all mitigation measures identified in the Biological Opinion issued by the USFWS on July 12, 2006, which would address any potentially adverse effects to federally threatened or endangered species that inhabit the streams that would be crossed by the rail line (see the Biological Opinion included in Appendix D). Mitigation Measure 26 would require data reconnaissance surveys prior to the beginning of construction of each segment of the rail line. Because construction likely would span several years, annual surveys would take place from July 1 to August 31 for each year of construction for a full range of species, including reptile and amphibian species, which are most likely to inhabit stream corridors.

P41.8 The Draft SEIS acknowledges that without mitigation, both the Western Alignment and Four Mile Creek Alternative would result in temporary adverse effects to hydrology and water quality during construction, including increases in sediment loads and total suspended solids related to construction in waterways, changes in surface water patterns, and effects related to water consumption for dust suppression. The primary purpose of the SEIS is to assess the potential environmental impacts of the proposed Western Alignment and compare the potential effects of the proposed Western Alignment to the effects of the approved Four Mile Creek Alternative. SEA here reaffirms the conclusion in the Draft SEIS, that with mitigation, the effects of both alignments would be similar and could be reduced through the implementation of recommended Mitigation Measures 40, 41, and 43, which require that, prior to construction, TRRC take into account in its final construction plans (i.e., cut and fill locations) how the plans could affect erosion and sedimentation to the Tongue River and the Tongue

River Reservoir. These measures would provide for a site-specific examination of the potential impacts on the Tongue River and Reservoir. Please refer to Master Response 12, Effects of the Project on Erosion and Sedimentation Rates, for additional information.

- P41.9 The commenter states that the Draft SEIS does not provide sufficient quantitative data on the potential effects on water quality. However, for the proposed Western Alignment and the approved Four Mile Creek Alternative, Table 4-22 of the Draft SEIS quantifies the anticipated annual increase in total suspended solids in the Tongue River; Table 4-23 quantifies the number of stream and river crossings, and Table 4-24 provides quantitative estimates on water usage during construction for both alignments. In addition, please refer to Master Response 12, Effects of the Project on Erosion and Sedimentation Rates, for a discussion of the quantitative methodology used to arrive at the erosion and sedimentation rate conclusions.

The commenter is also concerned that there is no adequate enforcement mechanism for the mitigation measures identified in the Draft SEIS. For a discussion of the enforcement of mitigation measures, please refer to Master Response 7, Enforcement of Mitigation Measures.

- P41.10 The efficacy of erosion control measures and BMPs are discussed in the Draft SEIS on page 4-104. Based on the documented success rates for the various BMPs identified, the conclusions regarding the effectiveness of the proposed erosion control measures in the Draft SEIS are assumed to be conservative.

- P41.11 Comment noted. SEA recognizes that the commenter disagrees with the conclusion that the increased time associated with herding cattle across the ROW via cattle passes would not be a significant impact. However, cattle passes are utilized across the country to provide access across railroad ROWs in agricultural areas. As required under recommended Mitigation Measure 5, TRRC would consult with individual landowners during construction to minimize conflict between construction activities and ranching operations. This consultation would provide affected land owners the opportunity to work with TRRC to minimize adverse effects through appropriate mitigation methods or direct compensation.

Mitigation Measure 3 would require TRRC to install cattle passes and private grade crossings at appropriate locations, as directed by individual landowners, to minimize impacts to ranching operations as a result of this project. The mitigation monitoring framework discussed in Master Response 7, Enforcement of Mitigation Measures, would ensure that TRRC implements and complies with all mitigation measures imposed by the Board.

- P41.12 The Draft SEIS does acknowledge economic effects to local ranchers through direct and indirect loss of land, displacement of capital improvements, and

conflicts with construction activities. Recommended Mitigation Measures 1 through 5 have been developed to address impacts to ranching operations, and would require TRRC to consult with individual land owners to minimize the disturbance to ranching activities through avoidance, replacement, or compensation for the loss of land or productivity.

P41.13 SEA cannot accurately predict exactly how many fires would be started as a result of the operation of the rail line. But the MT DNRC has compiled lists of the causes of fire statewide for the year 2004, as shown in the table below. Out of the 10,806 acres that burned last year, only eight fires were attributed to railroads, and those contributed to a loss of a total of 1.8 acres (0.02 percent). The vast majority of acres burned were started by lightning (67 percent) and debris burning (29 percent).

2004 Summary of Direct Protection and County Protection Fires & False Alarms		
Cause	# Fires	Total Acres
LIGHTNING	162	7,281.1
ARSON	4	0.4
CAMPFIRE	45	47.5
DEBRIS BURNING	59	3,131.6
EQUIPMENT	8	3.1
MISCELLANEOUS	36	338.0
POWERLINE	7	2.5
RAILROAD	8	1.8
SMOKING	3	.3
FALSE ALARMS	59	0
TOTAL	401	10,806.5
49% Lightning caused fires (excluding false alarms)		
51% Human caused fires (excluding false alarms)		

Source: <http://dnrc.mt.gov/forestry/fire/business/statistics.asp#firehistory>

Mitigation Measure 12 would require TRRC to maintain a serviceable access road within the ROW during construction and operation of the rail line. The road would be accessible from access points along the ROW at locations determined in consultation with the local fire officials, to permit entry to the railroad ROW to vehicles to aid in fire suppression. The road would also provide access for weed control. The provisions set forth in recommended Mitigation Measures 9 through 13 are intended to reduce the risks of fires and thereby protect personal property

from fires. Mitigation Measure 21 requires the railroad to comply with the applicable county weed control plans.

P41.14 The commenter is concerned that the project would result in substantial delays at public crossings and an increase in traffic during construction. Regarding the concerns related to crossings, as stated in recommended Mitigation Measure 55, TRRC would enter into a MOA with MDT for evaluating project-related safety needs. The MOA would include an evaluation of each crossing for safety needs and potential traffic problems during construction, including passage of emergency vehicles. Based on these evaluations, the MOA would set forth specific safety measures, such as warning signal and devices, and appropriate measures to alleviate any traffic problems, such as grade separations. Recommended Mitigation Measure 66 would address the potential for extended crossing delays during the operation period. This measure would require that TRRC comply with all reasonable Federal, state, and local requirements regarding train operations, including requirements related to maximum duration of crossing blockage.

Regarding the potential for increased traffic on local roads, Mitigation Measures 53 and 54 are intended to minimize the amount of construction-related traffic on public roads. Regarding the enforcement of these and other measures, please refer to Master Response 7, Enforcement of Mitigation Measures.

P41.15 The comment is concerned that the Environmental Justice analysis presented in the Draft SEIS is not thorough enough in terms of documenting how low-income residents may be disproportionately affected by the project. As documented in Section 4.3.9.4 of the Draft SEIS, however, SEA has concluded that, based on the likely increase in local jobs associated with construction and operation of the rail line, the project would have beneficial socioeconomic impacts and does not appear to impose disproportionately high or adverse impacts on racial or ethnic minorities or low-income populations.

P41.16 The Draft SEIS recognizes the potential adverse effects of dust, especially during the construction period. Section 4.3.7.2 of the document contains a discussion of fugitive dust emissions that is based on EPA criteria. Based on its estimates of fugitive dust emissions, SEA has concluded that recommended Mitigation Measures 69-73 would be adequate to ensure that impacts of fugitive dust emissions from the construction of either alignment would not be significant. Similarly, SEA properly concluded in Section 4.3.7.2 and 4.3.7.3 of the Draft SEIS that combustion emissions during the construction and operation of either alignment would not result in significant adverse effects on air quality. As a result, SEA does not expect that construction or operation of either alignment would adversely affect the health of cattle, wildlife, or humans.

P41.17 The comment is concerned that the analysis presented in the Draft SEIS does not adequately examine the potential effects that this project could have on the

environment because of the focused review conducted for Tongue River I and Tongue River II in Tongue River III and concern that the analysis of the potential impacts on fisheries in the Tongue River was not adequate.

SEA believes that the analysis presented in the Draft SEIS constitutes the requisite “hard look” at the project’s potential effects as required under NEPA. For a discussion of the adequacy of the analysis in the Draft SEIS, please refer to Master Response 1, Adequacy and Timing of Studies. Regarding the focused review of Tongue River I and Tongue River II in Tongue River III, please refer to Master Response 16, the Need for a New EIS. Regarding the potential impact on fish species, please refer to Master Response 2, Biological Resources – Conclusions and Mitigation.

P41.18 The primary concern expressed in this comment is that the focused review of Tongue River I and Tongue River II presented in Chapter 5.0 of the Draft SEIS does not adequately account for changes that have taken place since completion of the EISs associated with those projects. For a discussion of the methodology employed by SEA to ensure that it accounted for all relevant changes that could result in new significant impacts in the Tongue River I and Tongue River II portions of the rail line, please refer to Master Response 16, the Need for a New EIS.

P41.19 The comment says that the focused review of Tongue River I and Tongue River II in the Draft SEIS has failed to adequately account for new baseline conditions, (including changes to biological resources, reasonably foreseeable development and current activities in the region that could result in cumulative impacts), and that the assessment of the “no-action” alternative required under NEPA was insufficient.

Regarding the analysis of new baseline conditions in the project area, SEA has made an extensive effort to ensure that its baseline information is up to date. Please refer to Master Response 1, Adequacy and Timing of Studies. Regarding foreseeable development and current area activities, please refer to Master Response 21, Adequacy of Cumulative Analysis. Regarding the assessment of a “no-action” alternative in the Draft SEIS, please refer to Master Response 3, The No-Action Alternative.

P41.20 Contrary to the views of the commenter, the Board did not reject a route that was nearly identical to the proposed Western Alignment in 1996. The disfavored alignment in Tongue River II was located closer to the Tongue River than the proposed Western Alignment.

P41.21 The comment states that SEA has improperly segmented the project by completing three separate environmental reviews for Tongue River I, Tongue River II, and Tongue River III. For a discussion of the scope of each of these

proposals and why three separate analyses (EISs) were conducted, please refer to Master Response 8, Scope of EIS is too Narrow.

P41.22 The comment states that an evaluation and quantification of the effects of mitigation measures is required as part of the project. SEA acknowledges the importance of assuring the full implementation of the Board's mitigation, and the need for appropriate monitoring of mitigation measures. A quantitative evaluation (numerical rating) of the effectiveness of each measure is not feasible until a measure has actually been imposed and implemented and there is some time period by which to evaluate its efficacy. For a discussion of the framework that SEA has established to ensure that all measures imposed by the Board are properly implemented and monitored for effectiveness, please refer to Master Response 7, Enforcement of Mitigation Measures.

P41.23 The comment requests that a new EIS be completed for the entire line from Miles City to Decker. For a discussion of the issue of a new EIS for the entire rail line, please refer to Master Response 16, Need for a New EIS.



NATIVE ACTION

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December 6, 2004

Kenneth Blodgett
Surface Transportation Board
Case Control Unit
Washington, DC 20423

ATTN: STB Docket No. FD 30186 (Sub-No. 3)

RE: Native Action's comments on Draft Supplemental Environmental Impact Statement (STB Finance Docket No. 30186 (Sub-No. 3) Tongue River III.

Dear Mr. Blodgett,

Native Action is submitting brief summary comments on the above-referenced docket as follows. We are requesting additional time to submit more extensive comments that will supplement our comments. Please inform me as to our request to submit supplemental comments.

Native Action is a non-profit community based organization located in Lame Deer, Montana on the Northern Cheyenne Indian Reservation. Founded in 1984 by enrolled members of the Northern Cheyenne Tribe, Native Action's mission statement is: "to bridge racial, socio-economic, and environmental barriers by empowering, challenging, and educating people in order to protect the environment and enhance the quality of life for future generations."

As the Executive Director of Native Action, I am an enrolled member of the Northern Cheyenne Tribe and I reside 2 miles south of Lame Deer. One of Native Action's board members, Dr. Alonzo Spang Sr. and his family reside along Clubfoot Creek, which is within the Birney Village district of the Northern Cheyenne Reservation. Native Action works closely with the tribal members who live in the Birney Village on our Reservation, which is located directly along the Tongue River between Ashland and Birney Day Town. We are all very concerned with the impacts of the Tongue River Railroad to our homeland and to our tribal way of life here on the Northern Cheyenne Indian Reservation.

Native Action is a small organization with limited funding, but we have attempted to keep abreast of the developments of the Tongue River Railroad. Native Action has



A non-profit organization located on the Northern Cheyenne Indian Reservation dedicated to native self-sufficiency.



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submitted comments on the Tongue River Railroad for many years now, dating back to our correspondence to the Interstate Commerce Commission.

As we have stated in past correspondence, we do not believe that there is a public need for the Tongue River Railroad. Furthermore, the railroad will have serious and irreparable impacts to the Tongue River Valley and to our tribal culture.

1

The lands within the area where the Tongue River Railroad will be are very important historical and cultural lands to our Tribe. Many of our tribal members have testified at numerous hearings over the years on coal strip mining proposals, that we have tribal members who are buried in this area along the Tongue River, and that our tribal members depend on this area to gather ceremonial plants, soils, and river animals and birds. Our people continue to do traditional cultural ceremonies in this area along the Tongue River. One can see some of these ceremonial sites by just driving along the Tongue River Road, where Sundance and sweat lodges are visible. This area along the Tongue River is integral to the perpetuation of our Tribe's cultural way of life.

2

The Tongue River Railroad will irreparably impact this cultural way of life that we live here on the Northern Cheyenne Indian Reservation. There are statutes and caselaw that are supposed to protect our Tribe's way of life and we ask that you apply them in your analysis. The American Indian Religious Freedom Act, the National Historic Preservation Act and numerous cases all have determined that tribal historic and cultural sites are worthy of protection and that proposed developments must be closely scrutinized to prevent impacts.

Our Reservation has Class 1 Air Quality pursuant to the Federal Clean Air Act PSD regulations and the Tongue River Railroad, coupled with the methane gas developments, will negatively impact our air quality, with no mitigation proposed. Additionally, our Reservation also has established Tribal Water Quality Standards for the Tongue River and the Railroad will negatively impact our water quality in the River. Our Tribe also depends upon the water springs for not only water, but we also believe that water spirits reside therein. The EIS does not have data on impacts to our sacred springs that could be impacted by the Railroad's vibrations. Coupled with this is our concern with the methane companies' plans to drawdown our aquifers. We ask that you consider the impacts to the Tongue River from the influx of high sodium coal bed methane gas "wastewater". We are very concerned also with the proposed Western Alignment requiring moving 17.3 million cubic yards of fill material and its impacts to sediment loads in the River. What is your cumulative analysis of these impacts and your proposed mitigation? Why have you not used the findings of the on-going TMDL process, for Total Maximum Daily Load in the Tongue River?

3

4

Our homeland is very important to us and to future generations of Cheyenne people. As you can see, our Tribe has passed laws to protect our environment and we expect that these tribal laws be upheld. How do you propose to get around these tribal environmental laws in permitting the Tongue River Railroad directly along our River?

5

- 2 -

We have quantified water rights in the Tongue River and in the Tongue River Dam waters that are federally guaranteed both as to quantity and quality. These are property rights that belong to our Tribe and tribal membership. The Railroad will negatively impact these rights.

6

We are a subsistence-dependent Tribe and this was recently documented in the 2002 Northern Cheyenne Tribe and Its Reservation Report submitted to the BLM and the State of Montana for the Statewide Oil and Gas EIS and Amendment of the Powder River and Billings Resource Management Plans. The subsistence surveys that were documented in this report shows that many of our tribal families are dependent upon the wild game in this rich area of the Tongue River Valley and that this river valley is critical habitat and integral to the migratory routes for the wildlife that our people depend on for their subsistence. The EIS is totally lacking with data on wildlife populations and habitat in the Tongue River Valley. Your 20 year old biological inventories are out of date and only cover a small percentage of the proposed railroad route—leaving huge areas unstudied. We ask that you correct these inadequacies because the Cheyenne people depend upon this wild game to eat, including the fish and birds dependent on the Tongue River that we have subsisted on for generations. The Railroad will have irreparable impacts to our subsistence way of life and cumulative impact analysis and up-dated data analysis and mitigation is called for.

7

The Northern Cheyenne people also have tremendous cultural respect for the bald eagle, which is a threatened species under the Endangered Species Act. The Tongue River Valley is critical habitat for the bald eagles that our Tribe depends upon in our cultural ceremonies. We ask that you do a cumulative analysis as to the impact on the bald eagle from not only the Tongue River Railroad, but also include impacts from the methane gas developments in the area and the proposed Otter Creek Coal development near Ashland, Montana.

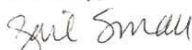
8

As a federal agency, you are our federal trustee who is charged with protecting our interests. How are you carrying out your fiduciary obligations to us while permitting this railroad that will irreparably impact our homeland and people?

9

Native Action would like to incorporate the Northern Plains Resource Council's comments into our comments as well because they cover much of the environmental basis for our environmental concerns.

Sincerely,



Ms. Gail Small
Exec. Director
Native Action

SEA's Responses to Comment Letter P42
Gail Small (December 6, 2004)

- P42.1 The commenter questions whether there is a true need for this project, and expresses concern about the impacts the project would have on Native American culture in the region and the Tongue River Valley.

The need for this project will be assessed by the Board and is not part of the environmental review process. For a discussion of the need for the project, please refer to Master Response 9, Determination of Public Convenience and Necessity. Potential impacts to the Tongue River Valley and Native American tribes are discussed throughout Sections 4.3, and particularly in 4.3.5 of the Draft SEIS. For additional discussion of potential effects on Native Americans, please refer to Master Response 15, Effect of the Project on Native Americans. The effects on the Tongue River Valley have been carefully addressed in the Draft SEIS, and SEA has developed mitigation measures that would reduce potential impacts to the greatest extent possible. While some significant impacts to the Tongue River Valley would be unavoidable, implementation of the mitigation measures identified in the Draft SEIS would substantially reduce the net impact of the project.

- P42.2 SEA's assessment of impacts on cultural resource sites has been conducted in compliance with applicable Federal, state and local laws and policies, including the American Antiquities Act of 1906, NHPA, NEPA, ARPA, AIRFA and the Montana State Antiquities Act. SEA is satisfied that, with its recommended mitigation (specifically the implementation of the PA), neither the construction nor the operation of the proposed Western Alignment or the approved Four Mile Creek Alternative would result in significant impacts to cultural resources. The PA developed for Tongue River III would replace the previous PA developed for Tongue River II, and would apply to construction of the entire rail line from Miles City to Decker. The updated PA is contained in Appendix C of this Final SEIS.

The PA, designed to ensure proper identification of cultural resources associated with the construction and operation of the Tongue River Railroad, was developed by SEA in consultation with ACHP, State Historic Preservation Office (MT SHPO), Bureau of Land Management (BLM), the Corps, MT DNRC, U.S. Department of Agriculture, the Northern Cheyenne Tribe, the Crow Tribe, and TRRC. The PA guides and determines the procedures by which the identification and treatment of cultural resources would occur. The PA includes requirements for additional investigation of the entire rail line ROW from Miles City to Decker. These investigations will include identifying and evaluating prehistoric, historic, and/or traditional cultural sites, districts, or landscapes.

Based on the results of these investigations, a detailed Treatment Plan will be developed and implemented in consultation with the parties to the PA and the Native American community. The Northern Cheyenne and the Crow are

concurring parties to the PA. SEA will seek the cooperation of the Northern Cheyenne and the Crow in the identification and evaluation of sites along the entire Tongue River Railroad route. The Northern Cheyenne and the Crow will also be asked for their assistance in the identification and evaluation of sites, if they are encountered during the construction process.

P42.3 Section 4.2.7.2 of the Draft SEIS identifies the Northern Cheyenne Reservation as a Class 1 area and discusses the meaning of that status. As stated in Section 4.3.7, SEA has concluded that, through implementation of recommended Mitigation Measures 69-73, neither the construction nor the operation of the proposed Western Alignment or the approved Four Mile Creek Alternative would have a substantial adverse effect on air quality.

P42.4 This comment raises four concerns for response, which are discussed separately below: 1) adequacy of the assessment of impacts of vibration from the proposed action on sacred springs; 2) Tongue River water quality impacts “from the influx of high sodium CBM gas “wastewater”; 3) cumulative impacts of construction-related sediment delivery to the Tongue River; and 4) relationship of the proposed action to the TMDL planning process that is underway for the Tongue River watershed.

(1) Impacts of vibration from the proposed action on sacred springs

The information presented in the Draft SEIS on this issue is based on a literature search to identify known sites as well as consultation with tribal representatives to determine sacred sites of importance to local tribes. No sacred springs were identified in the 3,000-foot corridor that was analyzed in the Draft SEIS. Impacts from this project to resources outside of this corridor are not adverse.

Changes in groundwater spring productivity due to earthquake-induced vibration are an observed and documented phenomenon. However, no studies have been identified to suggest that passing trains would have similar effects or document the effect of railroad-related vibration on spring flow. Earthquakes release energy at levels many orders of magnitude greater than that of passing trains. Train-induced vibration is not expected to have an adverse effect on sacred springs.

(2) Tongue River water quality impacts and construction-related sediment delivery

For a discussion of potential cumulative impacts on water quality in the Tongue River due to the influx of waste water from CBM development and erosion and sedimentation from railroad construction, please refer to Master Response 21, Adequacy of Cumulative Analysis, and Master Response 12, Effects of the Project on Erosion and Sedimentation Rates.

(3) Relationship of the proposed action to the TMDL planning process

For a discussion of coordination with the TMDL planning process that is currently underway for the Tongue River, please refer to Master Response 20, Total Maximum Daily Load (TMDL).

- P42.5 The comment suggests that the planning process for the project has neglected to consider tribal environmental laws. SEA has conducted extensive outreach to the Northern Cheyenne Tribe, as documented in Section 1.6.3 of the Draft SEIS, and as detailed in the PA located in Appendix C of this Final SEIS, will abide by the provisions of AIRFA throughout construction of the project and for a period thereafter determined to be appropriate.
- P42.6 The potential effects of the proposed rail line on water availability is discussed in Section 4.3.4.2 of the Draft SEIS. This issue is discussed further in Master Response 19, Availability of Water During Construction.
- P42.7 Preparation of the Draft SEIS included extensive evaluation of the potential effects of construction and operation of the proposed rail line on plant and animal species, which is documented in Section 4.3.2 of the Draft SEIS. This Final SEIS also includes recommended mitigation measures to address the potential adverse effects. Please refer to Master Response 2, Biological Resources - Conclusions and Mitigation, for further discussion of these issues surrounding the analysis of biological resources.
- P42.8 The effect of construction and operation of the proposed rail line on bald eagles is thoroughly addressed in the BA prepared as part of the Draft SEIS. SEA has revised the BA to include updated data from the state of Montana, which conducted a nesting survey in April 2005. The revised BA and Biological Opinion issued by the USFWS on July 12, 2006 are included in Appendix D of this Final SEIS.

Based on the information contained in the updated BA, the construction and operation of the proposed rail line would take place more than ½ mile from any nest and outside of the critical bald eagle management zones 1 and 2, which are located closest to the nest sites. Although the proposed rail line would be located further away, in management zone 3, the BA does indicate a possibility that rail line maintenance activities near active bald eagle nests could result in short-term displacement of eagles. The impact of maintenance of the Tongue River Railroad on bald eagle nesting is expected to range from minor (for low-level maintenance activities), to moderate (for extensive maintenance activities). Potential effects of train noise/vibration on nesting bald eagles are expected to be insignificant because of the considerable distance from the railroad to any known nest, and because the topography around each nest would buffer some of the noise/vibration associated with operating trains.

Section 6.6.2 of the Draft SEIS is revised to include a discussion of potential cumulative impacts to bald eagles and other wildlife species in the Tongue River

Valley. Please refer to Chapter 5: Errata, where it references Page 6-13, line 43 for additional information. In addition, in accordance with Mitigation Measure 24, TRRC shall adhere to all mitigation detailed in the Biological Opinion issued by the USFWS on July 12, 2006.

- P42.9 As a Federal agency responsible for making decisions that could adversely affect the natural environment, the Board is required under NEPA to evaluate the potential effects of the project on the natural environment. The Draft SEIS was prepared in accordance with NEPA, presents the effects of the proposed Western Alignment and compares the effects to those of the approved Four Mile Creek Alternative. The Board is also required to determine whether the project would be consistent with the public convenience and necessity. For a discussion of this process and how it protects the public interest during the decision making process, please refer to Master Response 9, Determination of Public Convenience and Necessity.

2507 Stower St.
Miles City, MT 59301
December 5, 2004

Surface Transportation Board
Case Control Unit
Washington, DC 20423
Attn: Kenneth Blodgett
STB Docket No. FD 30186 (Sub-No. 3)

Re: Tongue River Railroad Company, Inc. – Western Alignment
Draft Supplemental Environmental Impact Statement

Dear Mr. Blodgett and Members of the Surface Transportation Board:

This supplemental study does not adequately address the impact of the proposed Tongue River Railroad in the context of current conditions. I am confident the Board would find the Western Alignment and the entire proposed railroad route unnecessary if the EIS included all of the facts.

There is no representation that Tongue River Railroad Company proposes to transport agricultural commodities, passengers, or anything except coal. The EIS correctly states that all of the coal mines in this area now have rail service. Proponents assume that new mines will be opened by this railroad; such statements are speculative and prospective.

Proponents also envision that coal fired electrical generating plants will follow the rail service along its route. The logic is flawed because this is a largely uninhabited area with no market to be served by generating plants.

The only generating plant currently under construction in this area is the small 160 megawatt Centennial project at Hardin, MT; it is already served by Burlington Northern Santa Fe railroad. Existing high voltage transmission lines are already used to capacity; new lines will be required to reach distant urban markets with coal generated electricity.

In short, Tongue River Railroad will not insure that there is an investment in electrical generation and transmission lines needed to open new coal mines along the route.

The other option is transportation of coal to urban markets already served by Montana mines.

Montana coal is covered by more over-burden (dirt) atop thinner seams of coal deposits than coal mined in Wyoming. All other things being equal, this gives Wyoming mines a

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competitive advantage by lowering the cost of mining. However, Wyoming coal moves over a roundabout route to Midwestern markets, so Montana coal has a competitive advantage because of lower transportation cost. The Tongue River Railroad will cut 200 plus miles from the distance to market for Wyoming coal. This offers new opportunities for Wyoming coal as to existing mines and new mines, if any new mines are developed.

1 cont

However, the proposed railroad offers limited opportunity to Montana coal. Indeed, if sales of Montana coal are displaced, Montana may actually experience economic losses. The Tongue River Railroad EIS omits critical analysis of socio-economic alternatives.

The EIS offers considerable data (provided by Tongue River Railroad) describing the payroll and economic contribution of construction and operations. Clearly, some benefit will be derived, but the fact is that a large construction force must be recruited outside the area. There are not that many trained and experienced construction workers in the four rural counties impacted by Tongue River Railroad.

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The EIS does not include an analysis of infrastructure requirements – and the related cost to local governments. This is a vast area served by a few narrow, winding, unpaved country roads. State highways are narrow two lane roads not built to the capacity of the interstate highway system. They are completely inadequate for the traffic volume required to move personnel, equipment and materiel during construction of the Tongue River Railroad.

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The EIS is also silent on the matter of Coal Bed Methane (natural gas) production proposed for the area affected by Tongue River Railroad. Energy companies now hold hundreds of thousands of oil and gas lease acreage in this area – with a prospect of thousands of wells to be drilled and produced in the future. The actual number of wells is a matter of speculation but the proposed development has been studied and reported by the U.S. Department of Interior, Bureau of Land Management.

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Coal Bed Methane development impact should be included with the Tongue River Railroad EIS because the operations will coincide; meaning that the overall effect on this area far surpasses the impact of the Tongue River Railroad alone.

The EIS does not address the problem of funding the roads, utility services, housing and related government services such as schools and law enforcement that will become the responsibility of local governments following the influx of personnel that will occur with the Tongue River Railroad construction and Coal Bed Methane gas exploration and production. Mitigation measures stated in the EIS are vague and uninformative.

5

The area is currently suffering a protracted drought; reclamation of disturbed soil will be very difficult or impossible without adequate moisture to support plant growth. Without ground cover, soil erosion and wind erosion is likely to damage water quality in the Tongue River. Dust created by heavy traffic on unpaved roads and construction activity will significantly damage air quality.

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Referring to the testimony before STB at a hearing in Miles City, MT on November 16, 2004, the general tenor of favorable comment was a non-specific assertion that this area needed the perceived - but vague and unspecified - pecuniary benefit of Tongue River Railroad. Proponents did not offer any analysis of the socio-economic costs of development nor did they offer solutions to the problem of funding the infrastructure necessary to support their aspirations to construct railroads, open coal mines, and generate electricity that would be sold in distant urban markets.

7

In conclusion, the supplemental EIS does not offer a current, accurate statement of the impact of Tongue River Railroad in the context of current conditions. It should be rejected and rewritten. If Tongue River Railroad serves only as a conduit for Wyoming coal, the plan should be abandoned in favor of linking to another railroad – the Dakota, Minnesota & Eastern Railroad, for example.

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Very truly yours,


Gary W. Huckins

Encl: Original plus two (2) copies

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SEA's Responses to Comment Letter P43
Gary Huckins (December 5, 2004)

P43.1 This comment raises several issues, which are addressed separately below.

(1) The lack of a need for the project

Please refer to Master Response 9, Determination of Public Convenience and Necessity

(2) The lack of statements in the Draft SEIS concerning the transport of other materials on the railroad.

The entire rail line from Miles City to Decker would be classified as a common carrier railroad, which means that TRRC would have an obligation to transport all commodities on the line, upon reasonable request.

(3) The argument that a railroad will create a demand for new coal-fired electrical generating plants is based on flawed logic.

In Section 6.4.3 of the Draft SEIS, the text states that a development consortium has proposed the construction of a 750-megawatt coal-fired generator on the Otter Creek tracts and a 100-mile power line to tie into existing transmission lines. However, there are no statements in the Draft SEIS suggesting that coal-fired plants would increase in operation due to the rail line.

(4) New transmission lines would be required to transmit energy to distant urban markets.

The proposal analyzed in the Draft SEIS does not include the construction of electricity-generating power plants or the installation of new transmission lines to deliver power to urban markets.

(5) The project would eliminate the competitive market advantage currently held by the Montana coal industry.

Please refer to Master Response 11, Loss of Competitive Advantage Held by Montana Coal.

P43.2 The comment suggests that the project could result in adverse effects on Montana coal sales, which could have adverse socioeconomic impacts that the Draft SEIS has not adequately examined. For a discussion of this issue, please refer to Master Response 11, Loss of Competitive Advantage Held by Montana Coal. The effect of the proposed rail line construction on local employment levels is discussed in Section 4.3.9 of the Draft SEIS.

P43.3 The SEIS includes a thorough discussion of the project's effect on transportation corridors in Rosebud Big Horn and Custer counties. As discussed in Section 4.3.6

of the Draft SEIS, the projected increase in trips in the region during construction is not expected to be substantial, as the project includes the construction of a temporary access road within the ROW for the transportation of workers and equipment. Moreover, in Mitigation Measure 54, SEA recommends that, to the extent possible, TRRC would confine all construction-related traffic to a temporary access road within the ROW. Where traffic could not be confined to this access road, TRRC would ensure that contractors make necessary arrangements with landowners or affected agencies to gain access from private or public roadways. The access road would be used only during construction of the railroad grade, after which construction would be confined to the ROW.

On the basis of the available analysis and recommended Mitigation Measures, SEA does not expect that the project would contribute to a substantial increase in traffic volumes on local roads (state highways) that would require upgrades to existing infrastructure.

- P43.4 The commenter states that the analysis presented in the Draft SEIS must account for the potential cumulative effects associated with CBM development in the Tongue River Valley. Section 6.6 of the Draft SEIS includes a discussion of CBM well development and the potential cumulative effects in association with the proposed action and other related actions in the vicinity. The issue of CBM well development is discussed further in Master Response 21, Adequacy of Cumulative Analysis.
- P43.5 The construction of the proposed rail line and its effect on local population and services is discussed in Section 4.3.9.2, Socioeconomics, of the Draft SEIS. As explained there, the crews largely would be housed in a self-contained construction camp and traffic to and from the construction site would be provided largely via the rail line ROW, if SEA's recommended Mitigation Measure 54 is imposed and implemented. Impacts to local infrastructure are therefore not expected to be substantial. TRRC would be required to assist local governments in addressing economic and social problems, under recommended Mitigation Measure 81. Finally, operation of the rail line would generate revenues for the state and local governments, as presented in Chapter 2 of the Draft SEIS, which would help to offset any need for additional services or infrastructure as a result of the project.
- P43.6 Mitigation Measure 19 would require inclusion of erosion and sediment control plans in preconstruction planning and prompt revegetation of the ROW. SEA believes that the detailed provisions explained under subsection 3 (Revegetation Success Assurances) of Mitigation Measure 19 would be adequate to ensure that disturbed soils could be reclaimed with new vegetation. Regarding the potential for increased dust, recommended Mitigation Measure 71 would require regular watering of work areas for purposes of dust suppression. If Mitigation Measures 69 through 73 are imposed and implemented, SEA believes that the proposed

construction and operation would not result in substantial adverse effects on air quality.

- P43.7 The first part of the comment questions the need for the proposed project. For a discussion of this issue, please refer to Master Response 9, Determination of Public Convenience and Necessity. Regarding the second part of the comment, SEA does not expect that this project would require a substantial investment in supporting infrastructure. The increase in the regional population that could result from this project would be small, as discussed in Section 4.3.9 of the Draft SEIS. Regardless, this concern would be addressed through recommended Mitigation Measure 81, which would require TRRC to appoint a representative to consult with the affected county and local governments to assist impacted communities in addressing potential social and economic problems resulting from this project. SEA contemplates that, under this recommended mitigation, TRRC would provide practical and other appropriate assistance to the government planning agencies involved.

The comment also suggests that the project encompasses the opening of coal mines and the generation of electricity that would be sold in distant urban markets. The construction of new coal mines is not part of this application. The effects of new coal mine development would be thoroughly analyzed under NEPA when and if such an application for development were submitted to the appropriate authority. Please also see Master Response 21: Adequacy of Cumulative Analysis.

- P43.8 The comment states that the Draft SEIS is neither current nor accurate, and that it should be rewritten. SEA has made numerous updates in the Draft SEIS to ensure that its analysis and conclusions are based on accurate information. Further updated information is presented in this Final SEIS. For a discussion concerning the adequacy of SEA's approach to completing the analysis and the information used, please refer to Master Response 1, Adequacy and Timing of Studies, and Master Response 4, Information Used in Preparing the EIS.

The commenter also raises the question of whether the project would only serve Wyoming coal mines. The project would also serve existing Decker, Montana area mines, and mines in the Ashland area, if such mines are developed in the future to substitute for Montana mines that have closed or may close. Therefore, the function of the proposed rail line is not limited to transporting Wyoming coal.

February 4, 2005

Attn: Kenneth Blodgett
STB Docket No. FD 30186 (Sub-No.3)
Surface Transportation Board
Washington, D.C. 20423-0001

Re: World Wildlife Fund comments on Draft Supplemental Environmental Impact
Statement on Tongue River III.

Dear Mr. Blodgett:

The Tongue River III Draft Supplemental Environmental Impact Statement (DSEIS) was recently brought to the attention of World Wildlife Fund (WWF). WWF appreciates your willingness to consider our comments at this time. In addition, after an opportunity to thoroughly review the DSEIS, WWF may submit additional comments by the end of February.

WWF opposes the railroad because it will cause habitat degradation and fragmentation of prairie and streams within an ecoregion, the Northern Great Plains, that WWF has designated a "Global 200", a designation that places it among some 200 ecoregions globally that are most important for saving the diversity of life on Earth. The Northern Great Plains Ecoregion covers the region of mixed-grass prairie of Montana, North and South Dakota, Wyoming, Nebraska, Alberta and Saskatchewan. WWF-US has designated the Northern Great Plains as one of its six priority ecoregions for action because of the urgency and potential for conserving biodiversity in this vast grassland region. In addition, analyses by the World Conservation Union has concluded that temperate grasslands, of which the Northern Great Plains, including the Tongue River region, are part, are the least protected terrestrial biome on Earth.

WWF, in collaboration with 15 other local, regional and national nonprofit organizations, completed in 2004 a conservation assessment of the Northern Great Plains, which included a comprehensive analysis of conservation priorities and threats to biodiversity in the region (S.C. Forrest, H. Strand, W.H. Haskins, C. Freese, J. Proctor and E. Dinerstein. 2004. *Ocean of Grass: A Conservation Assessment for the Northern Great Plains*. Northern Plains Conservation Network and Northern Great Plains Ecoregion, WWF-US, Bozeman, MT). Similar to the World Conservation Union's global finding regarding temperate grassland protection, we found that less than 1.5% of the Northern Great Plains consists of areas where biodiversity conservation is the primary goal. Our assessment also included a thorough review of biodiversity analyses of the Northern Great Plains conducted by other institutions. One of the most thorough was by The Nature Conservancy titled *Ecoregion Planning in the Northern Great Plains Steppe* (Northern Great Plains Steppe Ecoregional Planning Team, February 4, 1999). Within the Northern Great Plains Steppe (essentially identical geographical coverage as WWF's Northern Great Plains Ecoregion), TNC identified the Wolf Mountains/Northern Cheyenne site,

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which includes roughly the upper two-thirds of the Tongue River drainage in Montana, as “high priority” for biodiversity conservation. Only about a dozen sites received such designation in the vast 5-state, 2-province region. The WWF assessment supported this conclusion: Our analysis showed that much of this site, including the southern reaches of the Tongue River area in Montana, fell within our top 30% biodiversity ranking for the Northern Great Plains because of habitat intactness and diversity of species and habitats. In addition, reflecting lack-of-data concerns raised in comments by the Northern Plains Resource Council, the TNC assessment rated the level of biodiversity inventory information available for the site as “low” and concluded that “additional inventory for natural communities and species is needed” (p. 180).

1 cont.

Another analysis being conducted by Montana’s Department of Fish, Wildlife & Parks also points to the biodiversity importance of the Tongue River Valley. Montana’s draft Wildlife Conservation Management Strategy, being funded under a nation-wide federal program for identifying wildlife conservation priorities in the 50 states, has ranked the region encompassing the Tongue River Valley as a Terrestrial Priority #1 in a three-tiered priority system, with 1 being highest and 3 lowest, and it has ranked both the Upper Tongue River and Lower Tongue River as Aquatic Priority #1. The final Wildlife Conservation Management Strategy for Montana is due in October 2005.

WWF concluded in our assessment that the most serious threats to biodiversity conservation in the Northern Great Plains ecoregion include, among others factors, oil and gas development, invasive non-native species and disease, alteration of aquatic regimes, and habitat fragmentation. We believe Tongue River III will directly contribute to and (or) indirectly exacerbate all of these threats.

Habitat fragmentation by the railroad and its construction and maintenance roads can be especially detrimental to native plants and animals. Roads and railroads provide avenues for introduction of invasive species and increase the likelihood of human/wildlife conflicts (Forman, R.T.T., and L. Alexander. 1998. Roads and their major ecological effects. *Annual Review of Ecology and Systematics* 29:207-231; Gelbard, J.L. and J. Belnap. 2003. Roads act as conduits for exotic plant invasion in a semiarid landscape. *Conservation Biology* 17:420-432). For example, Sprague’s pipit, a grassland-obligate bird that is a Montana “Species of Concern” because of declining populations, has been found to have lower abundance along roads, which may be attributable to the 20-30% reduction of suitable habitat associated with road rights-of-way within a 100-meter radius (Sutter, G.C., S.K. Davis, and D.C. Duncan. 2000. Grassland songbird abundance along roads and trails in southern Saskatchewan. *Journal of Field Ornithology* 71:110-116). Apart from the effects on large mammal movements and mortality, roads and railroads may also be barriers to small mammal movements (Licht, D.S. 1997. *Ecology and Economics of the Great Plains*. Univ. of Nebraska Press, Lincoln. 225 pp). Related to this point, the Tongue River Valley of Montana shows historic occurrences of the black-footed ferret, North America’s most endangered mammal. Because black-tailed prairie dogs and suitable habitat are still found in the region, the Tongue River Valley has recently been proposed as a focal area for black-footed ferret restoration (Proctor, J., S.C. Forrest, and B. Haskins. In press. Identifying potential focal areas for black-tailed prairie

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dog restoration. J. Hoagland, ed., *Island Press*). The construction, maintenance and disturbance associated with the railroad could seriously jeopardize the suitability of the area for ferret restoration.

2 cont.

We have read the comments submitted by the Northern Plains Resource Council and by Denise and Phil Wood and Walter and Victoria Baler. WWF fully concurs with the numerous concerns described in both comments regarding the largely unknown, but potentially serious, impacts of the proposed railroad on wildlife and the environment of the Tongue River Valley. The impacts of the railroad's construction and use could have far-reaching effects on wildlife movement patterns, water flow and quality, noxious weed dispersal, levels of environmental contaminants, and the overall environmental quality and quality of life in the Tongue River Valley and adjacent areas. These concerns are of particular importance in a grassland region such as the Tongue River where much of the prairie is still intact (untilled) and, except for a few species, still harbors all the plant and animal diversity that occurred here 200 years ago.

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The DSIES for Tongue River III is clearly inadequate. WWF believes a new EIS is required for railroad construction along the entire length of the Tongue River. The current DSIES has overlooked the high biodiversity value of the Tongue River Valley and, consequently, has underestimated the potentially severe negative impacts that railroad construction and traffic would have on both the Tongue River ecosystem and the environmental amenities the region offers to its residents, to the citizens of Montana, and to the U.S. public.

Respectfully submitted,

Curtis Freese, Ph.D.
Director, Northern Great Plains Program
World Wildlife Fund
P.O. Box 7276
Bozeman, MT 59715
Phone: 406 582-0235

SEA's Responses to Comment Letter P44
Curtis Freese, World Wildlife Fund (February 4, 2005)

- P44.1 The commenter's concerns about habitat degradation, fragmentation of prairies and streams, and opposition to the project are noted.
- P44. 2 The commenter raises several concerns related to the project's potential effect on wildlife. The specific concerns raised in the comment are identified and discussed individually for ease of review.

Habitat fragmentation can be detrimental to native plants and animals.

SEA acknowledges that the railroad would transect areas that currently provide habitat for a variety of species. For example, as documented in Section 4.3.2.2 of the Draft SEIS, the project could result in a reduction in the size of existing habitat patches, as well as habitat fragmentation, increase in edge-type habitat, and creation of barriers that block movement of wildlife between patches. In response to the potential for adverse impacts on species habitat, SEA has recommended that the Board impose Mitigation Measure 91 to deal specifically with the loss of habitat and provide compensation. Although this measure would reduce the degree of overall impact to wildlife habitat in the project area, SEA acknowledges in Chapter 8.0 of the Draft SEIS that loss of wildlife habitat would remain an unavoidable adverse effect of this project.

Roads and railroads can introduce invasive species and increase the likelihood of human/wildlife conflicts.

Mitigation Measure 21 would require that TRRC develop a noxious weed control program in consultation with the Task Force, local ranchers, and county extension agents, before rail line construction begins. The program would require TRRC to use construction methods that minimize the introduction and spread of noxious weeds, including the use of sterile ballast, weed-free seed straw, mulching, and hydroseeding materials. SEA concludes that the implementation of its recommended noxious weed control program would reduce adverse effects associated with noxious weeds from the construction of either the proposed Western Alignment or the approved Four Mile Creek Alternative.

Regarding roads and the potential impacts on plants and wildlife due to road building, recommended Mitigation Measure 54 is specifically intended to minimize the need for new roads. This measure would require that TRRC confine all construction-related traffic to a temporary access road within the ROW. The access road would be used only during construction of the railroad grade, after

which construction would be confined to the ROW. Therefore, it is not expected that the proposed project would require a substantial number of new roads that could adversely affect plants and wildlife.

The project could obstruct the movement of wildlife.

As stated in Section 4.3.2.3 of the Draft SEIS, the railroad could create a barrier to some species, such as reptiles and amphibians, and impede the movement of all wildlife (except birds) from upland areas to the Tongue River. The Draft SEIS also notes that species that migrate from upland areas to riparian corridors may be isolated from migratory destinations as a result of this project. Access opportunities for wildlife species over and under the railroad would be thoroughly assessed as part of the preconstruction surveys required under Mitigation Measures 25-27. Additional mitigation such as wildlife passages would be developed, as necessary, in consultation with the Task Force. Wildlife migration passages are discussed in more detail below.

Mitigation Measures 32 and 49 deal with wildlife issues. These measures set out the types of additional provisions that the Task Force could develop following the required pre-construction surveys to ensure the ability of wildlife to move throughout the rail corridor if this line is built and operated. Mitigation Measure 32, which focuses specifically on pronghorn antelope, would require the establishment and enforcement of fencing standards along the railroad ROW that would allow movement of pronghorn while excluding livestock. The measure would also require the identification of optimal passage-site locations for pronghorn movement across the railroad and follow-up monitoring on an annual basis to evaluate effectiveness of the passages. Mitigation Measure 49 is focused on culvert design and states, in part, that TRRC would be required to incorporate the culverts into the existing grade of the streambed to avoid, to the maximum extent possible, changing the character of the streambed and impacting migrating amphibians and reptiles.

The project could jeopardize the suitability of the area for black-footed ferret restoration.

As documented in Section 4.2.2.2 of the Draft SEIS, despite the existence of black-tailed prairie dog colonies, no black-footed ferrets are known to occur in the Tongue River Valley or near the vicinity of the proposed rail line from Miles City to Decker. Despite the apparent absence of this species in the project area, SEA is recommending Mitigation Measure 26 to address potential impacts related to the discovery of any members of this species during the construction and operation of this project.

Mitigation Measure 26 would require that prior to the beginning of construction of each segment and once full access to the railroad ROW is obtained, TRRC conduct aerial and ground-level surveys, as appropriate. The surveys would determine the presence or absence of black-footed ferrets. If black-footed ferrets

were discovered, the MT DFWP would be notified. Based on the surveys, TRRC would develop appropriate means to mitigate the effects of construction and operation of the line on the black-tailed prairie dog and the black-footed ferrets for approval by the Task Force, in accordance with the process set forth in recommended Mitigation Measure 14.

P44. 3 The comment suggests that the analysis in Draft SEIS does not fully reflect an understanding of the potentially serious impacts of the proposed railroad on wildlife and the environment of the Tongue River Valley. For a discussion of these issues, please refer to Master Response 1, Adequacy and Timing of Studies, and Master Response 2, Biological Resources-Conclusions and Mitigation.

P44.4 The comment suggests that a new EIS be completed for the entire rail line from Miles City to Decker. For a discussion of this issue, please refer to Master Response 16, Need for a New EIS.

ORIGINALBefore the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY, INC.-CONSTRUCTION
AND OPERATION-WESTERN ALIGNMENT

ENVIRONMENTAL COMMENTS

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Public RecordGORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036Attorney for United Transportation
Union, General Committee of Adjust-
ment on The Burlington Northern and
Santa Fe Railway Company, and
Montana State Legislative Board.

Due Date: December 6, 2004

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY, INC.-CONSTRUCTION
AND OPERATION-WESTERN ALIGNMENT

ENVIRONMENTAL COMMENTS

Preliminary Statement

Protestants, United Transportation Union-General Committee of Adjustment (UTU/GO-386),^{1/} and United Transportation Union-Montana State Legislative Board (UTU-MT), jointly submit these comments in response to the Draft Supplemental Environmental Impact Statement (DSEIS), issued October 15, 2004, in this proceeding.

Protestants are opposed to this unnecessary, uneconomical, and environmentally unsound transportation project, which has been under consideration now for 25 years. The construction of an additional rail line in this area would not be in the best interest of the public, or of railroad employees.

1. Character of STB. The DSEIS would accord the Surface Transportation Board (STB) with judge-like status in determining

^{1/} By John D. Fitzgerald, General Chairman, with offices at 400 East Evergreen Boulevard, Vancouver, WA 98660.

environmental matters as the "lead agency in this proceeding."
(DSEIS, 1-1);

The Board is an independent adjudicatory (fn.2, an adjudicatory body is one that acts as a judge, and settles matters judicially.) body that is administratively housed within the U.S. Department of Transportation (USDOT).

In actual fact, the STB has no such judge-like or Olympian status, and does not act here in an adjudicative role. In the instant proceeding the agency acts in a legislative capacity as an arm of the Congress under the Commerce Clause, and does not perform a judicial function. The STB, and its predecessor, the former Interstate Commerce Commission (ICC),^{2/} have certain legislative and judicial functions, as with a number of other independent federal agencies. The distinction between legislative and judicial agency functions is largely between future and past actions. A standard textbook by a former ICC Examiner points to the differences. Shinn, Glen L., Reasonable Freight Rates, 6 (Traffic Service Corp., 1952):

When the Commission prescribes reasonable rates or reasonable rate limits for the future, it performs a quasi legislative function; and when the Commission finds that the rates charged on past shipments were unreasonable and awards reparations against the railroads, it performs a quasi judicial function.

It appears that the U.S. Govt. Manual for a time neglected to even list the STB, a small agency; however, it appears that

2/ The ICC was abolished in 1995, and discredited, following continued and widespread consumer and Congressional revolt, against perceived favoritism by the ICC for the motor carrier industry in rate matters. See: ICC Termination Act, 109 Stat. 803 (Dec. 29, 1995).

the STB became successful in being listed, with the Manual transmitting the agency's view of itself. See: U.S. Govt. Manual/2004-2005, 333 (Office of the Federal Register, 2004). Unfortunately, that view is not reality. The STB in passing upon the Tongue River railroad construction project is performing a legislative function, and the agency is to be dealt with accordingly.^{3/}

2 cont.

2. Status of Review Proceedings. The DSEIS claims that Tongue River I and Tongue River II, are both administratively final, and that no judicial review proceeding is pending for Tongue River I. (DSEIS, 1-3, 1-8). In actual fact, admittedly the STB's SEA has undertaken a "limited reexamination" of the EIS in Tongue River I and Tongue River II. (DSEIS, 1-14). Further, the pending court proceedings involving Tongue River II, embrace aspects of earlier proceedings. See: Three-page attachment hereto. (Atta. A).

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3. Presumption of Approval. The DSEIS states that due to ICC Termination Act of 1995, "there is now a presumption that rail construction is to be approved," citing the recently-decided DM&E court case. Mid States Coal. Progress v. STB, 345 F.3d 520, 552 (8th Cir. 2003). (DSEIS, 1-18). We understand the "presumption" claim was raised in the STB's court brief but not challenged. The term "presumption" can mean the burden of coming forth with evidence is upon opponents to the project, or it can

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^{3/} We add that the public hearings held November 16 and 17, 2004, were not conducted by either STB members appointed by the President and confirmed by the Senate, or from personnel appointed as Administrative Law Judges.

merely mean the burden of persuasion is with the opponents, such that the project will be approved if the evidence is evenly-balanced (50%-50%).

The STB's "presumption" claim stems from a gratuitous statement made in its rulemaking proceeding involving connecting track, where the STB granted a class exemption for the construction of connecting track, but denied an exemption for all other construction projects. No public comments were solicited concerning the 1995 amendment to 49 U.S.C. §10901(c). Only the simple sentence appears, Class Exem. for the Construction of Connecting Track, 1 S.T.B. 75, 79 (1996):

Thus, there is now a presumption that construction projects will be approved.

The STB in its final DM&E decision, said the "presumption" is merely that "construction proposals are to be given the benefit of the doubt..." (emphasis supp.), which would confirm a preponderance of the evidence test, rather than a more burdensome presumption. Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, 32-33 n.81 (served Jan. 28, 2002).

4. Statutory Standard. We do not believe the revised 49 U.S.C. §10901(c), enacted in late-1995, is applicable to this proceeding. The 4-Mile Creek Alternative in Tongue River II was subject to the pre-1996 statutory provisions of §10901(c), by the savings clause of ICC Termination Act of 1995 (ICTTA).

Applicant concluded not to defend the STB's authorization, and sought reopening at the STB so as to file its Western Alignment, which would modify a portion of the line approved in Tongue

4 cont.

5

River II. The STB denied reopening, but assigned the modification a new docket number (Sub-No. 3), Tongue River III. Contrary to the DSEIS, this should not serve to remove a portion of the Tongue River II modification, (now Tongue River III), from the ICCTA savings clause.^{4/} Thus, the current Tongue River III should be governed by the ICCTA pre-1966 savings clause in all respects, without the so-called "presumption" for approval.^{5/}

5 cont.

5. STB Decision Following SEA Review. The DSEIS states the STB will issue a decision under 49 U.S.C. 10901, addressing both transportation and environmental issues,^{6/} following SEA review of the DSEIS. Apparently, the FSEIS will be issued prior to the STB's decision. (DSEIS, 2, xx, 1-3/1-4).

The DSEIS appears to imply the STB will move directly from FSEIS to agency decision. We do not believe the STB's hands should be tied by premature statements by the SEA on this score.

6

We believe the STB should not preclude requests for further evidence or pleadings concerning so-called "transportation issues," following issuance of FSEIS, and prior to final STB decision on the statutory standards. For example, the STB on March 11, 2003, stated the record on transportation matters was

^{4/} Of course, we have made this argument in earlier stages of this proceeding. For example, see: UTU Pet. for Reconsid., 3/31/03, 10-11.

^{5/} We have made this argument before. For example, see: UTU Pet. for Reconsid., 3/31/03, 10-11 & fn. 19-11.

^{6/} We consider the division of the case between "environmental" and "transportation" aspects of the project to be inappropriate, particularly since many of the same factors relate to both; for example, efficiency and economical operations are both environmental and transportation related.

completed on November 2, 1998, yet the record remains inconclusive with respect to The Burlington Northern and Santa Fe Railway Company (BNSF). (Decision, 3/11/03, 5 n.8).

6 cont.

6. Air Quality-DM&E Remand. We had anticipated issuance by the STB of its procedures to comply with the Court's remand in the DM&E case would be effected prior to the submission of environmental comments in the instant Tongue River III. Unfortunately, such guidance is not available. This requires commentors to guess at standards the agency may already have arrived at, yet has not released, for the instant Tongue River III proceeding..

7

7. Updated Train Movements. The DSEIS mentions railroad traffic movements and forecasts from TRRC, presented by TRRC in its "transportation-related" submission, but not that from railroad employees. (DSEIS, 2-4, 2-6, 4-139, 4-180). Accordingly, Attachment B hereto is the UTU's November 12, 2003 Supplemental Comments & Evidence in Opposition, consisting of cover plus 18 pages.

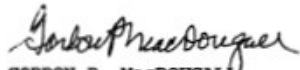
8

8. Overall View. The required environmental analysis should embrace the entire project--from Miles City to Decker--and not with each of the three components separately. Moreover, a necessary review must include the impacts upon the existing BNSF line from which traffic is to be diverted, for the proposed Tongue River construction primarily is for so-called "bridge" traffic, connecting two BNSF points, already adequately served by BNSF.

9

Respectfully submitted,

- 7 -



GORDON P. MacDOUGALL
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Washington DC 20036

Attorney for United Transportation
Union, General Committee of Adjust-
ment on The Burlington Northern and
Santa Fe Railway Company, and
Montana State Legislative Board.

December 6, 2004

- 8 -

COPIES
JAN - 7 - 97

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED TRANSPORTATION UNION-GENERAL COMMITTEE
OF ADJUSTMENT (GO-386), and UNITED TRANSPORTATION
UNION-MONTANA STATE LEGISLATIVE BOARD,

Petitioners,

vs.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,

Respondents.

No. 97-1011

PETITION FOR REVIEW

Petitioners, United Transportation Union-General Committee of
Adjustment (GO-386), and United Transportation Union-Montana State
Legislative Board, hereby petition the Court for review of the decision
of the Surface Transportation Board in its Finance Docket No. 30106
(Sub-No. 2), Tongue River Railroad Co.--Rail Construction and Operation--
Ashland to Decker, Montana, dated October 28, 1996 (served November 8,
1996), reconsid. den. December 20, 1996 (served December 31, 1996).^{*/}

Gordon P. MacDougall
GORDON P. MACDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

January 7, 1997

Attorney for Petitioners

^{*/} Embraces also Finance Docket No. 30186, Tongue River R.R.--Rail
Construction and Operation--In Custer, Powder River and Rosebud
Counties, Montana, and Finance Docket No. 30186 (Sub-No. 1), Tongue
River Railroad Company--Issuance of Securities.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, INC.
a Montana Non-Profit Corporation,

PETITIONER,

vs.

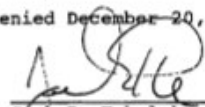
SURFACE TRANSPORTATION BOARD and the
UNITED STATES OF AMERICA,

RESPONDENTS.

No.

PETITION FOR REVIEW

Petitioner Northern Plains Resource Council, Inc. hereby petitions the Court for review of the decision of the Surface Transportation Board in its Finance Docket No. 30186 (Sub-2). Tongue River Railroad Co. -- Rail Construction and Operation -- Ashland to Decker Montana, dated October 28, 1996 and served November 8, 1996, and reconsideration denied December 20, 1996 and served December 31.¹
Dated this 6th day of January, 1997.


Jack R. Tuholske
Petitioner's Attorney
P.O. Box 7458
Missoula, MT 59807
406 721 6986

¹Embraces also Finance Docket No. 30186, Tongue River R.R. Rail Construction and Operation -- In Custer, Powder River and Rosebud Counties, Montana, and Finance Docket No. 30186 (Sub. No. 1), Tongue River Railroad Company -- Issuance of Securities.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE ACTION, INC.)
a Montana Non-Profit Corporation,) No.
)
Petitioner,)
v.)
)
SURFACE TRANSPORTATION BOARD)
and the UNITED STATES OF AMERICA,)
)
Respondents.)

07-710099

PETITION FOR REVIEW

Petitioner Native Action, Inc. hereby petitions the Court for review of the decision of the Surface Transportation Board in its Finance Docket No. 30186 (Sub-No. 2), Tongue River Railroad Co. -- Rail Construction and Operation -- Ashland to Decker Montana, dated October 28, 1996 and served November 8, 1996, and reconsideration denied December 20, 1996 and served December 31, 1996.¹

DATED this 27th day of January, 1997

SMITH & GUENTHER, P.C.

By: Patrick L. Smith
Patrick L. Smith
815 E. Front Street, Suite 3
Missoula, MT 59801
Telephone: (406) 721-1070
Attorney for Petitioner

¹Embraces also Finance Docket No. 30186, Tongue River R.R.--Rail Construction and Operation--In Custer, Powder River and Rosebud Counties, Montana, and Finance Docket No. 30186 (Sub-No. 1), Tongue River Railroad Company--Issuance of Securities.

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 30186 (Sub-No. 3) ^{*}/

TONGUE RIVER RAILROAD COMPANY, INC.-CONSTRUCTION
AND OPERATION-WESTERN ALIGNMENT

SUPPLEMENTAL COMMENTS & EVIDENCE IN OPPOSITION

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Washington DC 20036

Attorney for United Transportation
Union, General Committee of Adjust-
ment on The Burlington Northern and
Santa Fe Railway Company, and
Montana State Legislative Board.

Due Date: November 12, 2003

^{*}/ Oral hearing is requested.

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Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 30186 (Sub-No. 3)
TONGUE RIVER RAILROAD COMPANY, INC.-CONSTRUCTION
AND OPERATION-WESTERN ALIGNMENT

SUPPLEMENTAL COMMENTS & EVIDENCE IN OPPOSITION

Preliminary Statement

Protestants, United Transportation Union-General Committee of Adjustment (UTU/GO-386),^{1/} and United Transportation Union-Montana State Legislative Board (UTU-MT),^{2/} jointly submit these supplemental comments and evidence in opposition to the application, filed April 27, 1998, by Tongue River Railroad Company, Inc. (TRRC),^{3/} to construct and operate a 17.3-mile line of railroad, as an alternative routing for the "Four Mile Creek Alternative" approved in late-1996 by the Board in Tongue River RR Co.--Const. & Oper.--Ashland-Decker, MT, 1 S.T.B. 809 (1996) (1996 Decision).

1/ By John D. Fitzgerald, General Chairman, with offices at 400 E. Evergreen Boulevard, Vancouver, WA 98660.

2/ By Francis G. Marceau, Director, with offices at 98 Sussex, Kalispell, MT 59901.

3/ The application was originally filed by Tongue River Railroad Company (TRRC), with substitution of TRRC Inc. authorized by decision served September 2, 2003. The caption was changed by the Board, on the March 11, 2003, from Tongue River Railway Company--Construction and Operation--In Rosebud and Big Horn Counties, MT. 63 Fed. Reg. 34212. (June 23, 1998).

- 2 -

This supplement is filed pursuant to the Board's decision served July 7, 2003, as implemented by notice served October 3, 2003, as amended October 24, 2003.

The Board should assign the proceeding for oral hearing in the field, perhaps simultaneously with hearing on the forthcoming environmental analysis.

Ultimately, the TRRC application should be denied.

Background

1. The "Four Mile Creek Alternative" had been imposed by the Board in 1996 Decision in lieu of TRRC's original application for the southernmost portion of the proposed line between Ashland and Decker, MT. (1996 Decision). However, still being dissatisfied with the STB's "Four Mile Creek Alternative," TRRC on April 27, 1998, filed a new substitute application over a still different route, subsequently termed, "Western Alignment."^{4/}

2. These protestants filed comments on June 1, 1998. 49 CFR 1150.10(g). Subsequently, in response to STB notice served June 23, 1998, 63 Fed. Reg. 34212, these protestants on September 16, 1998, filed "Comments in Opposition," including request for oral hearing.

3. The STB's June 23, 1998 decision establishing a procedural schedule, stated that it was for issues involving whether the

^{4/} The instant "Western Alignment" initially was sought in a July 1997 petition to reopen 1996 Decision, subsequent to the filing in early 1997 of petitions to review 1996 Decision before the U.S. Court of Appeals for the 9th Circuit. (Nos. 97-70037, et al.). However, the Board directed a new filing fee and docket number--the instant F.D. No. 30186 (Sub-No.3).

application meets the statutory criteria of 49 U.S.C. §10901, but a decision on such issues would not be issued prior to completion of the environmental review process. The decision on the merits would follow completion of the environmental review process, and would address both transportation and environmental issues in that decision. (Decision, 6/23/98, 3; 63 Fed. Reg. at 34213).^{5/}

4. The STB on July 10, 1998, instituted environmental review of the April 27, 1998 application, new environmental proceeding to run concurrently with that previously initiated on June 23, 1998. The STB invited public comments, with reply by TRRC. (Decision, 7/10/98; 63 Fed. Reg. 37442-45).

5. The STB on March 30, 1999, removed the condition in 1996 Decision that construction of the line between Miles City and Ashland be completed within three years from November 8, 1996.

6. The proceedings remained under advisement at the STB until January 17, 2003. On that day TRRC filed a petition seeking to file supplemental evidence. TRRC stated that some three years earlier, on March 2, 2000, it had advised STB's Section of Environmental Analysis (SEA) to suspend work until certain issues, unrelated to the environmental review, were resolved. On December 19, 2002, TRRC met with SEA Staff (and other STB personnel), and

^{5/} The Board's procedure differs from that taken in the DM&E case, where the Board first sought to determine the public convenience and necessity under §10901, prior to conducting the environmental review, described in Mid States Coal Progress v. Surface Transp. Bd., 345 F.3d 520, 533 (8th Cir. 2003). However, here the Board in its March 11, 2003 decision, attempted to convert the instant procedure, established June 23, 1998, into the DM&E format described in Mid States Coal Progress, *supra*. Protestants vigorously objected to the proposed change. See: Pet. for Reconsid., 3/31/03). The STB's action is inconclusive. (Decision, 5/19/03). The proposed change comes too late, and would be prejudicial to objectors.

requested SEA to resume its environmental review. (Petition, 1/17/03, 2). Upon inquiry, the March 2, 2000 and December 19, 2002 communications between TRRC and SEA were said to have been oral.

7. Protestants were surprised by TRRC's January 17, 2003 filing, and were unaware that the STB in March, 2000, had suspended work on the TRRC application. Indeed, the STB's Chairman, Linda Morgan, on September 13, 2000, had stated the agency was working on the case.^{6/} The first official word of the suspension to reach protestants was on May 22, 2001.^{7/} Protestants can only speculate as to the reasons motivating TRRC for suspension of work by SEA, and/or for resumption of work by SEA.^{8/}

8. The Board on March 11, 2003, granted TRRC's petition for submission of supplemental evidence. TRRC filed its supplemental evidence on May 1, 2003. However, TRRC on the same day petitioned to substitute Tongue River Railroad Company, Inc., an entirely different entity, in the stead of applicant TRRC. The Board granted the substitution on September 2, 2003,^{9/} and the Board on October 3, 2003, issued its decision requiring responses to the

^{6/} This advise was given during a luncheon address in Washington, DC before the American Bar Assn.'s Section of Admin. Law & Procedure-Transp. Committee.

^{7/} See: U.S. House, Congestion in the United States Transportation System, Hearings before Comm. on Transp. & Infrastructure (Hrg. 107-22) 102, 113 (2001).

^{8/} There were no meaningful changes in STB membership, other than the December 3, 2002 announcement that a different member had replaced Chairman Morgan. (STB Release No. 02-51).

^{9/} Petition for Reconsideration filed Sept. 22, 2003, pending.

supplemental evidence on November 12, 2003.^{10/}

ARGUMENT

I. THERE HAVE BEEN IMPORTANT CHANGES
SINCE THE EVIDENTIARY RECORD OF 1998.

The verified statement of Terry L. Ungricht, and the supplemental verified statement of John D. Fitzgerald, indicate there have been important changes in railroad operations since 1998.

1. Train movement. There has been an increase in coal train movement from Wyoming and Montana origins over the Huntley-Forsyth-Miles City line. In 1998, the movement was an average of 4 loaded and 4 empty coal trains daily between Sheridan and Forsyth, with two merchandise trains daily in each direction over the Huntley to Miles City route. Although the non-coal train movement is virtually unchanged, the coal train movement has risen to a daily average of 7 loaded and empty trains. (Supp. V.S. Fitzgerald; V.S. Ungricht; V.S. Kraemer, 2-3; R.V.S. Kraemer, 4-6).

The proposed diversion of 7 coal trains in each direction from the present Huntley-Forsyth-Miles City route in favor of TRRC routing would impair the viability of the former Northern Pacific line. Moreover, the large amount of bridge traffic undercuts the TRRC financial presentation. The economic issue is not primarily whether the Western Alignment is more viable than the Four-Mile

^{10/} TRRC, Inc. was created in 1998 as a substitute for TRRC, but applicant inexplicably waited until after submitting its supplemental evidence in May 2003, before effectuating the change in the application. Cf. Finance Docket No. 33644, Tongue River Railroad Company, Inc.-Acquisition and Operation Exemption-Tongue River Railroad Company, 63 Fed. Reg. 54186 (Oct. 8, 1998), Pet. to Revoke den. Nov. 13, 1998.

Creek Alternative, but whether it is advisable that BNSF maintain two routes, primarily or exclusively, for this overhead coal business. In short, whether the cost of some additional mileage over the Northern Pacific route is more than offset by the additional capital cost in movement over a route to be newly constructed almost exclusively or solely for the overhead business..

2. Coal Origins. TRRC has revised the origins of its tonnage projections. The prospective coal movement is now predominately from Wyoming and Montana origins in the Decker/Spring Creek area already served by BNSF. Clearly, as indicated by UTU's Fitzgerald, the TRRC proposal is virtually all for a bridge movement. (Supp. V.S. Fitzgerald).

The origin revisions, arguably, might make some sense if the primary goal is for BNSF to be more competitive with the proposed DM&E line into Wyoming. However, a pivotal issue where the railroad construction would be for bridge movement, with BNSF to have two routes between Decker and Miles City, is not whether the new route would be financially viable standing on its own. Rather, the public interest--including the interest of railroad employees--depends on the revenue and expenses for both routes taken together, unless abandonment or downgrading for one is contemplated. Here, BNSF had failed its burden of proof.

II. THE APPLICATION REMAINS INCOMPLETE
IN A NUMBER OF OTHER IMPORTANT RESPECTS.

The application remains incomplete. Protestants pointed to a number of deficiencies in their September 16, 1998 filing. (Com-

ments, 9/16/98, 5-8).^{11/} Further deficiencies have become apparent. In addition to the failure of an adequate financial showing, of increasing importance is the substantial increase in coal train bridge movement moving via Sheridan-Huntley-Forsyth-Miles City. There remain other matters as well.

1. TRRC, Inc. The STB on September 2, 2003, permitted TRRC Inc. to substitute for TRRC, but this was well after TRRC's evidence had been submitted May 1, 2003. The matter of the substitution is on reconsideration, as the STB acknowledged in its decision served November 10, 2003. (Decision, 11/10/03, 1). There are significant questions involved in the substitution, for which protestants have been unable to secure sufficient information. The nature of the applicant is an important element in any construction project, yet the STB has adopted procedures which have prevented meaningful inquiry.

2. Participation by Ranchers. The STB has severely limited the participation--and thus has restricted comments and evidence--by ranchers and others who were only first made parties to the supplemental proceedings on October 24, 2003. The failure to designate some parties of record until October 24, 2003 was STB

^{11/} There continues to be a lack of information concerning the anticipated agreement between TRRC and BNSF--of special importance to BNSF employees. BNSF is now funding TRRC's expenses before federal and state regulatory agencies. (Supp. Gustafson, 9). The STB, itself, should make the TRRC/BNSF agency funding agreement of public record.

staff error.^{12/} The October 3, 2003 notice listed 21 parties, with an additional 17 parties not named until October 24, 2003.^{13/} Such a lack of timely notice clearly has tainted the entire proceeding, and is also prejudicial to these UTU protestors, for railroad employees acquire information from railroad customers and the public.

Many of the excluded ranchers had been parties of record earlier, and were shown on the July 29, 1998 service list, but had been removed and not included on the October 3, 2003 list.^{14/}

3. Participation by OCPS. The STB/ICC's Office of consumer or public services (variously named at various times) until recently participated in the TRRC proceedings, providing assistance to members of the public unaccustomed to the agency's procedures. Indeed, such STB/ICC staff assistance was offered at the public hearings held in 1992 at Lame Deer, Forsyth, Miles City, MT, and Sheridan, WY. The withdrawal of agency assistance has served to restrict public input.^{15/}

^{12/} The STB, without public notice, in mid-2002, appears to have abolished its Office of the Secretary, with key personnel now under its Office of Proceedings. In placing important procedural matters with those dealing with the merits, the agency may have compromised the function of an independent Secretary.

^{13/} Two of the original 21 parties, shown in the October 3 list, subsequently were deleted in the October 24 list.

^{14/} Several of the ranchers requested an extension in time owing to their late-listing. The STB on November 10, 2003, said no requests had been made for an extension of the November 12, 2003 deadline. (Decision, 11/10/03, 1). Yet the STB Staff and public were advised by the STB of the extension request on November 10, 2003. (ID 209365).

^{15/} We have raised a number of procedural points in our filings made during 2003, which are incorporated herein.

III. THE PROCEEDING SHOULD BE
ASSIGNED FOR PUBLIC HEARINGS.

The STB should assign the proceeding for public hearings in the involved area. The most recent hearings were in 1992, over a decade ago. The hearings could serve the dual purpose of providing testimony on the merits, as well as to bring forth comments on the proposed environmental analysis.

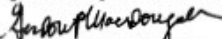
Facts are in controversy, particularly with respect to the prospect for rail transportation of coal produced in the Ashland area, such as at Otter Creek.

Public hearing is particularly warranted in view of the STB Staff action in summarily removing ranchers and others from the service list, and then restoring them only on October 24, 2003, hardly a sufficient period of time within which to submit updated or original cements/evidence in advance of the November 12, 2003 deadline.

CONCLUSION

The Board should assign the proceeding for public hearing.
The application should be denied.

Respectfully submitted,


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

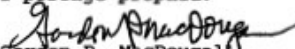
Attorney for United Transportation
Union, General Committee of Adjust-
men on The Burlington Northern and
Santa Fe Railway Company, and
Montana State Legislative Board.

November 12, 2003

Certificate of Service

I hereby certify I have served a copy of the foregoing upon
all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall

F.D. No. 30186 (Sub-No. 3)

VERIFIED STATEMENT
OF TERRY L. UNGRICH

My name is Terry L. Ungricht. I reside in Sheridan, WY. I am employed by The Burlington Northern and Santa Fe Railway Company (BNSF) as a conductor. I have 24 years seniority with BNSF. I am the same person of same name who was restored to the service list as a party of record by the Surface Transportation Board (STB) in its notice served October 24, 2003. I am fully familiar with train operations in the involved area proposed to be served by the Tongue River Railroad Company (TRRC).

I am a member of the United Transportation Union (UTU), and have served as UTU's Wyoming State Legislative Director since May 2002. For the past ten years, I have been the Legislative Representative for UTU's Local 951, based at Sheridan, WY. The UTU has approximately 800 members in Wyoming, and approximately 90 at Sheridan. I have been requested by our General Chairman, R.S. Knutson, to update information since the 1998 submissions in this proceeding.

I am opposed to the proposed TRRC construction. It would have an adverse impact on UTU members, as well as upon BNSF employees in other crafts. There are approximately 200 railroad employees in the Sheridan area. I believe the coal fields are adequately served by the established BNSF and Union Pacific Railroad Company (UP) lines. Moreover, I do not look with favor upon the proposal of Dakota, Minnesota & Eastern Railroad (DM&E) to build into the Wyoming area.

- 1 -

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BNSF currently is averaging approximately 7 loaded and empty coal trains daily between Huntley and Forsyth. There presently is an average of approximately 2 non-coal trains in each direction over this line, subject to seasonal fluctuations, particularly with respect to grain movements.

Sheridan currently has 12 two-man crews operating coal trains between Sheridan, WY and Forsyth, MT, for a total of 24 employees. All of these positions would be eliminated when traffic is rerouted over the TRRC. BNSF also maintains a short turn pool that delivers empty coal train sets and brings the loaded sets out of the Decker and Spring Creek mines. This pool currently has 5 two-man crews, for a total of 10 employees. I also anticipate another job loss for the Sheridan helper pool. This helper pool is operated engineer-only, currently with 9 turns, such that I anticipate about one-half of these jobs would be eliminated, for 4.5 jobs.

To the above total of 38.5 employees (enginemen and trainmen), there would be a loss of extra board employment, for another 11.5 jobs eliminated. Thus, I project a loss of 46 jobs, merely for enginemen and trainmen, if the TRRC project comes into being. I have not calculated the loss for maintenance, car repair, and other non-operating support positions.

The above figures could be lower if BNSF operates over the TRRC line, by contract or otherwise, with Sheridan-based crews. In addition, these figures do not take into consideration job loss at Forsyth, MT, which the TRRC would by-pass completely.

FROM : UNGRICHT

FAX NO. : 307-672-8528

Nov. 09 2003 01:14PM P1

Attachment B
Page 15 of 19

VERIFICATION

Under the penalties of perjury, I affirm the foregoing
statement is true and correct as stated.


TERRY L. UNGRICHT

Dated at
Sheridan, WY
November 9, 2003

- 3 -

11/09/03 14:10

TX/RX NO.4775

P.001 - 14 -

F.D. No. 30186 (Sub-No. 3)

SUPPLEMENTAL VERIFIED
STATEMENT OF JOHN D. FITZGERALD

My name is John D. Fitzgerald, with offices at 400 East Evergreen Boulevard, Vancouver, WA 98660. I submitted a verified statement five years ago, dated September 12, 1998, which was included in the September 16, 1998 submission in opposition to the application by Tongue River Railroad Company (TRRC) to construct and operate the so-called "Western Alignment." I continue to serve as General Chairman for United Transportation Union-General Committee of Adjustment (UTU/GO-386).

I have reviewed the supplemental evidence of Tongue River Railroad Company (TRRC), filed May 1, 2003, as well as the earlier reply comments filed by TRRC on November 2, 1998. This additional information does not bolster the TRRC project, and does not lessen my opposition.

1. I continue to consider the Tongue River Railroad Company, or Tongue River Railroad Company, Inc., as a scam for The Burlington Northern and Santa Fe Railway Company (BNSF). I note from the April 25, 2003 statement of Mike T. Gustafson, President of TRRC, that BNSF is providing funds to TRRC for expenses incurred in this application proceeding. (Supp. Gustafson, 9). This revelation comes as no surprise to me, for TRRC's counsel has appeared for BNSF in numerous adversary proceedings involving UTU/GO-386. My organization over the years has become well acquainted with TRRC counsel as BNSF counsel. The instant proceeding is the rule, not the exception.

- 1 -

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2. TRRC has revised its coal tonnage projections for the proposed TRRC line between Miles City and Decker/Spring Creek. The initial projection of 26.4 million tons for the year 2009, the first operating year, now has been revised upward to 32.1 million tons, but the projection for Ashland area mines has been reduced from 1.0 million tons of this amount to a mere 300,000 tons. The major change in the haulage projection is to substantially reduce the coal business from the Decker/Spring Creek area estimated to move over TRRC, and to substantially increase the diversion of Wyoming coal from present BNSF routing via Huntley-Forsyth-Miles City, in favor of rerouting via TRRC. Thus, the Decker/Spring Creek tonnage would drop from 20.4 million tons estimated in the 1998 testimony, to a lesser 15.3 million tons in the 2003 testimony, even though total traffic would increase to 32.1 million tons. On the other hand, Wyoming coal would increase from 5.0 tons in the 1998 testimony, to 16.6 million tons in the 2003 testimony. I have taken these figures from the Application, p. 14, and Supp. Morey Tonnage Forecast.

3. It is clear to me that the TRRC application primarily is for diverting BNSF Wyoming coal business, rather than for serving mines located in the Decker/Spring Creek area. Whereas the 1998 application projected Decker/Spring Creek coal originating tonnage moving over TRRC at 20.4 million tons (year 1), 21.4 million tons (year 2), and 22.4 million tons (year 3), the current revision projects declining Decker/Spring Creek coal tonnage of 15.3 million tons (year 1), 11.5 million tons (year 2), and 9.8 million tons (year 3). On the other hand, for Wyoming coal, the 1998 application projected Wyoming coal moving over TRRC at a

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steady 5.0 million tons for each of the initial three years, whereas the 2003 revision is for a much greater 16.6 million tons of Wyoming coal in year 1, and 16.8 million tons in year 2, dropping to 12.3 million tons when Ashland area tonnage in the amount of 4.8 million tons is claimed for mines not yet in existence.

4. Approval of the Tongue River project would impair the viability of BNSF operations over the route between Huntley and Miles City, as I indicated in my 1998 verified statement. In 1998, the four trains in each direction over the Sheridan-Forsyth-Miles City line, slated for transfer to a TRRC routing, constituted approximately two-thirds of the entire movement on the line. Indications are that the diversion now would be even greater, based upon the 2003 TRRC evidence which I have recited above. In addition, as an example, 7 loaded coal trains operated daily over the former Northern Pacific line in January 2001, rather than the 4 trains mentioned by BNSF in the 1998 testimony, according to a widely-accepted industry source. Frailey, Fred W., The Empire of BNSF, published in Trains, June 2001. It is my understanding that the present daily movement approximates 7 loaded and empty coal trains over this trackage.

5. The projected construction of the DM&E line into the Wyoming PRB, should it become a reality, would add to the adverse impact upon BNSF employees. Although I understand the STB's approval of the DM&E project was remanded by the reviewing court on October 2, 2003, the diversion of significant Wyoming PRB coal tonnage from BNSF augments the potential for harm to BNSF personnel.

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6. The proposed construction of the TRRC line and diversion of BNSF traffic from existing BNSF routing, would adversely affect BNSF train and engine crews. The impact will be at Sheridan, WY, and Glendive, Forsyth, and Great Falls, MT, and other locations.

7. I incorporate my September 12, 1998 verified statement, except as modified herein for revised data. If the project is nevertheless approved, despite the considerable opposition, the Board should at the minimum impose the standard employee protective provisions.

VERIFICATION

Under the penalties of perjury, I affirm the foregoing statement is true and correct as stated.


JOHN D. FITZGERALD

Dated at
Vancouver WA
November 12, 2003

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SEA's Response to Comment P45
United Transportation Union (December 6, 2004)

- P45.1 The comment raises concerns that the project is unnecessary, uneconomical, and environmentally unsound. As explained in Master Response 9, Determination of Public Convenience and Necessity, the Board will determine whether the project is inconsistent with the present and future public convenience and necessity, in accordance with the criteria of 49 U.S.C. 10901, after the environmental review process is concluded. The decision on public convenience and necessity will consider both transportation-related issues and potential environmental concerns.
- P45.2 The Board's handling of this case is consistent with NEPA and longstanding precedent. SEA performs the entire environmental review. One of the important purposes of NEPA is to allow for public input, and SEA held public meetings to provide for public input. After the environmental review is complete, the Board will issue a decision on the merits of the project, taking into account the entire record (SEA's documentation and comments) as well as information on economic merits. The Board is the appropriate lead agency, as it is the agency charged with licensing rail construction.
- P45.3 Comment noted. Page 1-3, line 38 of the Draft DEIS does state that both proceedings in Tongue River I and Tongue River II are administratively final, which is correct, except that Tongue River II is still pending judicial review in the U.S. Court of Appeals for the Ninth Circuit. In the paragraph above, line 28 and 29, the Draft SEIS correctly notes that the court proceeding relating to the Board's decision in Tongue River II is being held in abeyance pending the completion of Tongue River III. These same references are made again on page 1-12 lines 1-4.
- Tongue River I, unlike Tongue River II, is administratively final, and no judicial review proceeding is pending. SEA is conducting a limited re-examination of Tongue River I and Tongue River II to determine whether the conclusions reached are still valid in light of proposed refinements to the approved alignments and changed circumstances. Where appropriate, SEA is also relying on the environmental analysis previously prepared in Tongue River I and Tongue River II. SEA does not consider this analysis to constitute reopening of either proceeding.
- P45.4 The comment on interpretation of 49 U.S.C. 10901 is noted.
- P45.5 The comment on which statute applies has been noted. This issue is ultimately for the Board to determine, but SEA notes that, given that the Board denied TRRC's request to reopen Tongue River II and that a new application in Tongue River III was filed **after** January 1, 1996 (the effective date of the ICCTA), the Board is likely to find the statute as it existed after that date applicable here.

- P45.6 The normal process would involve the Board issuing a final decision after issuance of this Final SEIS and based on the record before it at that time. If any requests to permit further evidence on transportation issues are received after this Final SEIS is issued, the Board will decide whether to allow further evidence at that time.
- P45.7 Pursuant to the court's remand, SEA has published a Draft Supplemental EIS for the DM&E proceeding, which includes additional analysis of the environmental impacts of increased coal consumption that might result from increased availability and lower prices for this coal. SEA has prepared a Master Response addressing the additional analysis conducted as a result of the court's decision in DM&E, and how that analysis relates to the potential effects, if any, of the proposed Tongue River Railroad on air emissions. Please refer to Master Response 23 Cumulative Air Quality Analysis.
- P45.8 Comment noted.
- P45.9 The comment suggests that a new EIS should be completed for Tongue River I, Tongue River II, and Tongue River III. But it is well settled that NEPA does not require completed environmental work to be repeated. Section 1.5 of the Draft SEIS presents SEA's reasoning for limiting the scope of the document to the proposed Western Alignment, and a limited reexamination of Tongue River I and Tongue River II to account for adjustments in the alignment and changed circumstances. These issues are also addressed in Master Response 16, The Need for a New EIS.

Regarding the potential impacts on the existing BNSF line, this line would continue to carry a considerable number of non-coal freight traffic and some coal trains, particularly those servicing the Sarpy Creek, Big Sky, and Western Energy mines. In addition, the existing BNSF lines would provide auxiliary lines to the Tongue River rail line in the event that the Tongue River rail line was temporarily non-operational. Lastly, one of the operating scenarios currently being considered between TRRC and BNSF involves BNSF's operation of the proposed rail line from Miles City to Decker with its own crews and locomotives. The revenues generated from this operating scenario would further offset any reduction in rail traffic on the existing BNSF lines.

SEA believes that the scope of the SEIS is appropriate because each of these projects are separate, albeit related actions; SEA's approach has ensured that without duplicating work already completed in Tongue River I and Tongue River II, the SEIS in Tongue River III reflects circumstances that have changed significantly enough to warrant further review.

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